

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Petition of Qwest Corporation for)	WC Docket No. 09-135
Forbearance Pursuant to 47 USC §160(c))	
In the Phoenix, Arizona Metropolitan)	
Statistical Area)	

COMPTEL'S ADDITIONAL COMMENTS

COMPTEL, through undersigned counsel, hereby submits these additional comments in the above-captioned proceeding in response to the Commission's questions posed in the April 15, 2010 Public Notice.¹ The Commission has asked whether it should "adopt a different standard for analyzing incumbent local exchange carrier forbearance petitions than has been applied in prior forbearance proceedings involving similar requests for relief."² The short answer is yes. Last summer, the D.C. Circuit remanded the Commission's decisions in the Verizon 6-MSA and Qwest 4-MSA forbearance proceedings precisely because the Commission has failed to apply a consistent standard in analyzing such ILEC forbearance petitions.³ As COMPTEL and many other parties stated in their initial comments, the Commission should

¹ FCC Public Notice, Request For Additional Comment and Data Related To Qwest Corporation's Petition for Forbearance From Certain Network Element and Other Obligations in the Phoenix, Arizona MSA, WC Docket No. 09-135, DA 10-647 (rel. Apr. 15, 2010).

² *Id.*

³ *Verizon Telephone Companies v. FCC*, 570 F.3d 294 (D.C. Cir. 2009); *Qwest Corporation v. FCC*, No. 09-1257 (D.C. Cir. Aug. 5, 2010).

adopt a different standard than it used in the *Qwest Omaha* proceeding⁴ because, among other reasons, the Commission's predictive judgments regarding Qwest's post-forbearance market behavior failed to materialize. COMPTTEL incorporates by reference those comments here⁵ and the market power standard it proposed for determining whether there is sufficient competition in the Phoenix MSA to warrant granting Qwest forbearance from its wholesale unbundling obligations.

COMPTTEL explained in its initial comments why the Commission should not find that mobile wireless service is in the same product market as wireline service for mass market customers.⁶ In order to determine whether the two services are in the same product market, the Commission must discern whether they are close substitutes for one another and how much, if any, switching between wireless and wireline services occurs because of changes in price (cross elasticity of demand). If customers switch between wireless and wireline services but not in response to price changes, wireless is not a close substitute for wireline service and cannot prevent the exercise of market power in the wireline market. Qwest has offered no evidence that customers switch between wireless and wireline service in response to price changes. Nor has it offered any evidence that wireless service in Phoenix constrains its ability to implement wireline rate increases or otherwise prevents the exercise of market power. In the absence of

⁴ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005), *aff'd. sub nom. Qwest Corporation v. FCC*, 482 F.3rd 471 (D.C.Cir. 2007).

⁵ See Attachment A hereto.

⁶ Public Notice at 2.

evidence that wireless offerings in Phoenix constrain Qwest's wireline pricing, wireless and wireline service should not be considered to be in the same product market.⁷

The Commission should deny Qwest's Petition for Forbearance for all of the reasons set forth in COMPTTEL's Comments. Qwest has grossly understated its share of the residential market and has provided no reliable evidence of its share of the business market.⁸ Without this information, the Commission cannot possibly determine that there is sufficient competition in the Phoenix market to constrain Qwest's rates, terms and conditions, protect consumers and promote and enhance competition if forbearance is granted.

April 29, 2010

Respectfully submitted,

/s/

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⁷ COMPTTEL Comments at 30-36.

⁸ COMPTTEL Comments at 37-40; *see also*, Late Filed Reply Comments of the Arizona Corporation Commission at 12-17; 20-28.

ATTACHMENT A

**BEFORE THE
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In the Phoenix, Arizona Metropolitan)	
Statistical Area)	

COMPTTEL'S OPPOSITION TO QWEST PETITION FOR FORBEARANCE

September 21, 2009

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SUMMARY

Almost exactly eight months after the Commission denied Qwest's last Petition for Forbearance from loop and transport unbundling requirements, dominant carrier regulation and *Computer III* requirements in the Phoenix MSA, Qwest came back to the Commission asking for the same relief again. At the same time the Commission is seeking comment on Qwest's second petition for forbearance in Phoenix, the decision denying Qwest's first petition is back before the Commission on remand from the Court of Appeals. In requesting comments on the remand, the Commission has sought input on the market share test to be applied in forbearance proceedings. COMPTTEL's comments in the remand proceeding are attached hereto and incorporated by reference.

The Commission should again deny Qwest's request for deregulatory relief in Phoenix because Qwest has again failed to demonstrate that enforcement of the statutory provisions and Commission regulations from which it seeks forbearance is not necessary to (1) ensure that Qwest's rates, charges, practices and regulations are just, reasonable and not unjustly discriminatory, (2) protect consumers and (3) serve the public interest.

As a preliminary matter, the Commission should summarily deny Qwest's requests for forbearance from the *Computer III* requirements and dominant carrier regulation. Qwest made no showing whatsoever with respect to how forbearance from the *Computer III* requirements would satisfy each prong of Section 10(a) of the Communications Act. With respect to dominant carrier regulation, the Commission has already granted Qwest substantial forbearance throughout its 14 state service territory. In its Petition, Qwest has not demonstrated that it is entitled to additional relief, nor has it

remedied any of the failures of proof identified by the Commission in the *Qwest Nondominance Order*.

Most importantly, the Commission must deny Qwest's request to be relieved of its statutory unbundling obligations. At the outset, Qwest has failed to demonstrate that Section 251(c) or Section 271 have been fully implemented in the Phoenix MSA, a necessary precondition to the Commission's entertaining a request for forbearance under Section 10(d).

Qwest has failed to come forward with reliable evidence that there is sufficient facilities-based competition in either the wholesale or the retail Phoenix MSA markets to warrant forbearance. Qwest inappropriately discounts its retail residential market share by a wireless substitution rate estimated at 25 percent. Qwest has failed to provide sufficient detail on the methodology used by Market Strategies International to arrive at that estimate, making it impossible for the Commission to gauge its reliability. Nor has Qwest shown that wireless competition constrains its ability to raise its wireline prices or otherwise exercise market power.

Qwest also failed to provide any reliable evidence of its own retail business market share, relying instead on the results of a survey that asked 1500 business customers to identify their primary telecommunications carrier. Qwest does not disclose, however, how many of the survey respondents are served by carriers using Qwest's wholesale facilities and services. Nor did Qwest provide any details with respect to the methodology used to conduct the survey or select the respondents, making it impossible for the Commission to verify the reliability of the survey results.

Qwest has not shown that there is adequate wholesale competition to discipline its post-forgearance rates. The only evidence Qwest provided of facilities-based competition in the wholesale market conclusively shows that carriers provide last mile access to only a fraction of the commercial buildings in the Phoenix MSA.

For all of these reasons, the Commission must deny Qwest's Petition for Forbearance from dominant carrier, *Computer III* and unbundling regulation in the Phoenix MSA.

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COMPTTEL'S OPPOSITION TO QWEST'S PETITION FOR FORBEARANCE

COMPTTEL hereby opposes Qwest Corporation's Petition for Forbearance from (1) its obligations to provide wholesale access to voice grade DS0, DS1 and DS3 unbundled loops and transport, (2) dominant carrier regulation and (3) *Computer III* requirements in the Phoenix, Arizona Metropolitan Statistical Area ("MSA").¹

Specifically, Qwest requests forbearance from the loop and transport unbundling requirements of both Section 251(c)(3) and 271(c)(2)(B)(ii) of the Communications Act, 47 U.S.C. §§251(c) and 271(c)(2)(B)(ii), and Section 1.319 of the Commission's Rules, 47 C.F.R. §§51.319(a), (b), (e); from the dominant carrier tariff requirements set forth in Part 61 of the Commission's Rules, 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.58 and 61.59; from the Commission's price cap regulations, 47 C.F.R. §§61.41-61.49; from the dominant carrier requirements arising under Section 214 of the Act, 47 U.S.C. §214, and Part 63 of the Commission's Rules, 47 C.F.R. §§ 63.03 and 63.04, concerning the process for acquiring lines, discontinuing services and making assignments or transfers of

¹ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Arizona Metropolitan Statistical Area filed March 24, 2009 at 7-11 ("Qwest Petition").

control; and from the “Computer III requirements, including Comparably Efficient Interconnection (‘CEI’) and Open Network Architecture (‘ONA’) requirements.”² This Petition represents Qwest’s second attempt to achieve identical deregulation for its wholesale and retail services in Phoenix. The Commission denied its earlier forbearance petition just over a year ago³ and has not yet acted on the remand of that decision from the Court of Appeals.⁴

As it has done before, Qwest alleges that in the 64 wire centers that make up its service area in the Phoenix MSA, it faces “competition from a wide range of technologies and a broad array of service providers”⁵ including wireline, wireless, cable and VoIP providers, and that the competitiveness of the market is evidenced by its declining market share.⁶ Qwest has failed to demonstrate, however, that elimination of the dominant carrier, *Computer III* or unbundling requirements to which it is subject will promote competitive market conditions or enhance competition among service providers,

² *Id.*

³ *In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, FCC 08-174 (rel. Jul. 25, 2008) (hereinafter “*Qwest 4 MSA Order*”), remanded sub nom. *Qwest Corporation v. FCC*, Case No. 08-1257 (D.C. Cir. Aug. 5, 2009).

⁴ Public Notice, Wireline Competition Bureau Seeks Comment on Remands of *Verizon 6 MSA Forbearance Order* and *Qwest 4 MSA Forbearance Order*, DA 09-1835 (rel. Aug. 20, 2009) at 3.

⁵ Qwest Petition at 1. Qwest made the identical allegation in its earlier petition requesting forbearance for the Phoenix MSA. See Petition of Qwest Corporation for Forbearance pursuant to 47 U.S.C. §160(c) in the Phoenix, Arizona Metropolitan Statistical Area filed April 27, 2007, WC Docket No. 07-97, at 1.

⁶ Qwest Petition at 3-4.

constrain its rates, terms or conditions of service or protect consumers. For these reasons, Qwest's Petition should be denied.

I. The Statutory Standard

Qwest bears a heavy burden in proving that it meets the statutory prerequisites to obtain forbearance from the loop and transport unbundling requirements of the Commission's rules and Section 251(c)(3) and 271(c)(2)(B)(ii) of the Communications Act; the dominant carrier requirements of the Commission's rules and Section 214 of the Act; and the Commission's *Computer III* requirements. Section 10(a) of the Act, 47 U.S.C. §160, provides that the Commission may not grant forbearance from any provision of the Act or any Commission regulation unless and until it determines that three conditions have been satisfied. The Commission must make affirmative findings that (1) enforcement of the provision of the Act or the Commission regulation is not necessary to ensure that Qwest's charges, practices, classifications, or regulations by, for, or in connection with that telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary for the protection of consumers; *and* (3) forbearance from applying the provision or regulation is consistent with the public interest.

In making the public interest determination, Section 10(b) requires the Commission to consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions and enhance competition among telecommunications providers. If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a finding that forbearance is in the public interest.

Section 10(d) prohibits the Commission from forbearing from Section 251(c)(3) or Section 271 until it determines that those requirements have been fully implemented.

The Commission's interpretation of the statutory standard with respect to forbearance from the unbundling requirements is the subject of the remands of the *Verizon 6 MSA*⁷ and *Qwest 4 MSA*⁸ decisions. The Court of Appeals has instructed the Commission to better articulate the basis for denying the Verizon and Qwest petitions for unbundling relief in the 10 MSAs. Specifically, the Court stated that

Indeed, it may be reasonable in certain instances for the FCC to consider an ILEC's possession of [redacted] percent, or any other particular percentage, of the marketplace, as a key factor in the agency's determination that a marketplace is not sufficiently competitive to ensure its competitors' abilities to compete. It may also be reasonable for the FCC to consider only evidence of actual competition rather than actual and potential competition. Nevertheless, it is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past.⁹

Consistent with the Court's instructions, on remand the Commission must articulate a workable market share standard -- one that examines competition in both the retail market and the wholesale market -- to determine whether a geographic market is sufficiently competitive to warrant elimination of the statutory requirements that Congress deemed

⁷ *In the Matter of Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. §160(c) in the Providence, Boston, New York, Philadelphia, Pittsburgh and Virginia Beach MSAs* WC Docket No. 06-172, Memorandum Opinion and Order, FCC 07-212 (rel. Dec. 5, 2007) ("*Verizon 6 MSA Order*"), *remanded sub nom. Verizon Telephone Companies v. FCC*, 2009 U.S. App. Lexis 3269 (D.C. Cir. 2009).

⁸ *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, FCC 08-174 (rel. Jul. 25, 2008), ("*Qwest 4 MSA Order*") *remanded sub nom. Qwest Corporation v. FCC*, Case No. 08-1257 (D.C. Cir., Aug. 5, 2009).

⁹ *Id.* at 26.

necessary to open markets to competition and provide consumers with a choice of providers, and of Commission regulations designed to avoid abuse of market power.

Simultaneously with this filing, COMPTTEL is submitting its Comments on the remand of the Verizon and Qwest decisions¹⁰ (a copy of which is attached hereto and incorporated by reference) in which it proposes a standard that will more accurately assess the likelihood that market forces will be sufficient to constrain the ILEC's rates, terms and conditions of service, protect consumers and enhance competition if the Commission lifts the ILEC's statutory obligation to provide wholesale access to unbundled loops and transport. Specifically, when an ILEC seeks to be relieved of its statutory UNE wholesale obligations and there are competitors in the market that use the ILEC's UNEs to provide service to their own customers, the Commission should not grant forbearance unless the ILEC is able to demonstrate with hard evidence that (1) its retail market share is less than 50%, and only lines served by a competitor solely over its own or a third party carrier's network and facilities are attributed to the competitive side of the equation *and* (2) there are at least two alternative facilities-based wholesale providers in addition to the ILEC whose networks reach and are capable of serving 100% of the customer locations in the geographic area for which forbearance is sought.

As discussed below, Qwest has not come forward with reliable or verifiable evidence that it meets this standard. Nor has it come forward with reliable or verifiable evidence that would support a determination that further forbearance from dominant

¹⁰ See Comments of COMPTTEL filed in WC Docket Nos. 06-172 and 07-97 on September 21, 2009.

carrier regulation or the *Computer III* requirements is warranted. Accordingly, the Commission should deny Qwest's Petition.

II. Qwest Is Not Entitled To Further Forbearance From Dominant Carrier Regulation

In March and August 2007, the Commission granted Qwest substantial forbearance from dominant carrier tariffing and price cap regulation throughout its 14-state service territory.¹¹ Specifically, the Commission determined that Qwest's provision of in-region, interstate, interLATA retail telecommunications service is no longer subject to the requirements of Section 203 of the Act or Sections 63.03, 63.19, 63.21, 63.23 and 63.60 – 63.90 of the Commission's rules, 47 C.F.R. §§63.03, 63.19, 63.21, 63.23, 63.60-63.90, only to the extent that Qwest would be treated as a dominant carrier under these rules for no reason other than its provision of those services on an integrated basis. The Commission also determined that Qwest will not be required to, and in fact is prohibited from, filing tariffs for in-region, interstate, interLATA telecommunications services pursuant to Sections 61.31-61.38 and 61.43 of the Commission's rules, 47 C.F.R. §§61.31-61.38 and 61.43; that Qwest is not required to establish an "interexchange basket" pursuant to Section 61.42(d)(4) of the Commission's rules, 47 C.F.R. §61.42(d)(4); and that Qwest would not be subject to Sections 61.28 and 43.51 of the Commission's rules, 47 C.F.R. §§61.28 and 43.51, to the extent that, and only to the

¹¹ *In the Matter of Qwest Communications International Inc for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207 (2007) ("*Qwest Nondominance Order*"); *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, CC Docket No. 00-175, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007) ("*Section 272 Sunset Order*").

extent that, it would be treated as a dominant carrier under those Sections for no reason other than its provision of in-region, interstate or international telecommunications service on an integrated basis.¹²

The Commission further determined that Qwest had failed to present persuasive evidence that “it no longer possesses exclusionary market power within its region as a result of its control over a ubiquitous telephone exchange service and exchange access network.”¹³ As a result of Qwest’s exclusionary control over these bottleneck access facilities, the Commission declined to relieve Qwest from dominant carrier regulation of its interstate exchange access services, including tariffing and price cap regulation¹⁴-- the very same relief it requests here. A year later, the Commission denied Qwest’s petition for further forbearance from dominant carrier regulation of its mass market and enterprise switched access services in the Phoenix MSA on the grounds that it had not demonstrated that all three prongs of Section 10 would be satisfied if forbearance was granted.¹⁵

In this its third attempt to achieve deregulation of its interstate access services, Qwest has again failed to present persuasive evidence that it no longer possesses exclusionary market power as a result of its control over a ubiquitous local exchange and exchange access network in the Phoenix MSA or that it is otherwise entitled to further forbearance from enforcement of the dominant carrier regulations to its switched access services. Instead, Qwest makes basically the same arguments here that it has made

¹² *Id.* at ¶¶ 76-78.

¹³ *Id.* at ¶¶ 20, 68, 90; *Qwest Nondominance Order* at ¶¶47, 54-59.

¹⁴ *Id.*

¹⁵ *Qwest 4MSA Order* at ¶24.

before in requesting nondominant treatment. Qwest's complaint that tariffing and price cap regulation prevent it from responding to "competitors' bundled service offerings," market conditions and competition is nonsense.¹⁶ Subsequent to filing its Petition, Qwest publicly announced that it had extended for five years its strategic partnership with DIRECTV, and crowed that it "offers customers bundle discounts for Qwest High-Speed Internet® and DIRECTV services, the convenience of one bill and personalized bundles designed to meet their specific communication and entertainment needs." Qwest further explained that the "powerful combination of Qwest High-Speed Internet and DIRECTV provides opportunities for the companies to create and launch integrated features that differentiate the Qwest bundle from cable."¹⁷ Despite its protest that dominant carrier regulation is somehow holding it back, it does not appear from Qwest's public announcements that either price cap regulation or any other dominant carrier regulation is inhibiting Qwest's ability to respond to market conditions or its competitors' -- specifically cable's -- bundled service offerings.

The Commission observed in the *Qwest Nondominance Order*, that:

Qwest asserts that it faces "significant" competition within its region from "wireline, wireless, and other forms of intermodal competition," that its retail access line base has "declined significantly," and that its "connection share" of the residential local exchange market is declining. Qwest has failed, however, to present persuasive evidence that it no longer possesses exclusionary market power within its region as a result of its control over a ubiquitous telephone exchange service and exchange access network.¹⁸

¹⁶ Qwest Petition at 46.

¹⁷ "Qwest and DIRECTV Reach Agreement To Extend Strategic Alliance," (July 19, 2009) available at <http://news.qwest.com/directvpartner>.

¹⁸ *Qwest Nondominance Order* at ¶47, quoting the Teitzel Declaration filed with the Qwest nondominance forbearance petition.

In this Petition, Qwest similarly asserts that it “is now subject to extensive *mass market* and *enterprise market* competition” in the Phoenix MSA from “a wide variety of intramodal and intermodal competitors, including (but not limited to) Competitive Local Exchange Carriers (‘CLECs’), cable companies, wireless providers and Voice over Internet Protocol (‘VoIP’) providers.”¹⁹ As a result of this competition, Qwest alleges that the “Phoenix MSA is one of the most competitive telecommunications markets in the U.S.”²⁰ and that its “retail access line base in the Phoenix MSA has fallen sharply since 2000.”²¹ Qwest, however, has again failed to present persuasive evidence that it no longer possesses exclusionary market power by reason of its control over bottleneck access facilities.

Having elected not to address the deficiency in its proof which the Commission identified in the *Qwest Nondominance Order*, Qwest is not entitled to any additional dominant carrier forbearance relief. As the Commission has previously determined, application of the Section 10(a) criteria “is no simple task and a decision to forbear must be based upon a record that contains more than broad, unsupported allegations of why those criteria are met.”²² Qwest’s invocation of the mantra that the Section 10 criteria are satisfied because of the presence of competitors in Phoenix is not sufficient to carry the day. Qwest continues to maintain control over a ubiquitous telephone exchange

¹⁹ Qwest Petition, Brigham Declaration at ¶2 (emphasis in the original).

²⁰ *Id.* at ¶ 5.

²¹ *Id.* at ¶ 3.

²² *In the Matters of Bell Operating Companies Petitions For Forbearance From The Application of Section 272 of the Communications Act of 1934 To Certain Activities*, 13 FCC Rcd 2627 at ¶16 (1998).

service and exchange access network in Phoenix and continues to have exclusionary market power. For these reasons, the Commission should deny Qwest's request for forbearance from dominant carrier regulation of its switched access services beyond that which the Commission has already granted in the *Section 272 Sunset Order* and the *Qwest Nondominance Order*.

The Commission should also deny Qwest's request for forbearance from price cap regulation of its switched access services because it has not shown that such relief would not adversely affect access charges in areas of the Arizona study area outside of the Phoenix MSA. In the *Verizon 6 MSA Order*, the Commission noted that because its rules require incumbent LECs to geographically average their access rates, price cap ILECs with state wide operations effectively use their lower-cost, urban and suburban operations to subsidize their higher-cost rural operations. The likely impact of removing from price cap regulation lower cost operations in large urban MSAs would be to increase the cost to the ILEC's more rural operations.²³ For this reason the Commission directed future applicants for forbearance from dominant carrier rate regulation to address whether and how a grant of relief at the geographic level they seek would impact other rates in the applicable study area.²⁴

While acknowledging the Commission's directive, Qwest's response raises more questions than it answers.²⁵ Qwest states that it will use the Part 69 and Part 61 rules to calculate maximum Subscriber Line Charge ("SLC") rates "'as if' the demand for the

²³ *Verizon 6 MSA Order* at n.102

²⁴ *Id.*

²⁵ Qwest Petition at 9-10.

SLCs [in the Phoenix MSA] was still being treated as dominant and subject to the rules. The maximum SLC rates would be produced for the entire study area and would represent the maximum rates which could be charged. *The actual rates in the non-dominant tariff or contracts could be lower.*²⁶ What this seems to indicate is that if forbearance is granted, the Qwest customers in the more rural areas of Arizona will pay for the deregulation of the switched access rates in the Phoenix MSA through higher SLC charges than the Phoenix customers pay. Because the population of the Phoenix MSA is approximately 66% of the population of the state of Arizona,²⁷ such an arrangement will allow Qwest to recover subscriber line costs disproportionately from the one-third of the population that lives outside the Phoenix MSA. For this reason, Qwest has failed to show that price cap regulation is not necessary to ensure that its charges, practices, classifications or regulations for mass market switched access services are just, reasonable and not unjustly or unreasonably discriminatory. The Commission should deny Qwest's request for forbearance from dominant carrier regulation.

III. Qwest Is Not Entitled To Further Forbearance From The Computer III Requirements

Although Qwest asks the Commission to forbear from enforcing the *Computer III* requirements, including the Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements,²⁸ it did not even make an attempt to show that grant of its request would satisfy each prong of Section 10(a). Indeed, Qwest mentions *Computer III* only twice in its Petition – once in the paragraph where it

²⁶ Qwest Petition at 9 (emphasis added).

²⁷ See Qwest Petition at 5 and <http://www.census.gov/popest/states/NST-ann-est.html>.

²⁸ Qwest Petition at 11.

describes what it wants forbearance from and once in the conclusion where it reiterates its request for relief.²⁹ Qwest made absolutely no effort whatsoever to explain how or why enforcement of the CEI, ONA or any other *Computer III* requirements is not necessary either to ensure that its rates, terms and conditions of service are just, reasonable and nondiscriminatory or to protect consumers. Nor did Qwest discuss how or why forbearance from the *Computer III* requirements would be consistent with the public interest.

In order to meet the public interest forbearance criterion, the Commission has ruled that a petitioner must explain how the benefits of a regulation can be attained in the event of forbearance.³⁰ Qwest has not done so. The CEI and ONA requirements were implemented to prevent the Bell Operating Companies (“BOCs”) from discriminating against unaffiliated information services providers.³¹ In light of the continuing validity of the Commission’s finding that Qwest possesses exclusionary market power within its region as a result of its control over a ubiquitous telephone exchange service and exchange access network,³² Qwest clearly retains the ability to discriminate in providing access to that network to unaffiliated information service providers. Qwest did not bother to address how the nondiscrimination objectives of the CEI and ONA requirements could be achieved if the Commission were to forbear from applying the requirements.

²⁹ Qwest Petition at 11 and 47.

³⁰ *In the Matter of Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, as Amended*, 15 FCC Rcd 7066 at ¶ 7 (1999).

³¹ *California v. FCC*, 39 F.3d 919 at 925, 928 (9th Cir. 1994).

³² *Qwest Nondominance Order* at ¶47.

The Commission must deny a petition for forbearance if it finds that any one of the three prongs of the Section 10(a) test is unsatisfied.³³ Qwest offered no evidence or argument that even one of the three prongs would be satisfied absent enforcement of the *Computer III* requirements. Instead, it alleged simply that forbearance would allow it "to respond quickly to customer demands for information services with innovative offerings."³⁴ Significantly, Qwest did not claim that compliance with the *Computer III* requirements prevents it from responding quickly to customer demands. Based on the self-description included in the "About Qwest" section of its press releases, the *Computer III* requirements do not appear to be inhibiting Qwest from providing innovative product offerings at all:

Customers coast to coast turn to Qwest's industry-leading national fiber-optic network and world-class customer service to meet their communications and entertainment needs. For residential customers, Qwest offers a new generation of fiber-optic high-speed Internet service, as well as digital home phone, Verizon Wireless, and DIRECTV services. Qwest is also the choice of 95 percent of Fortune 500 companies, offering a full suite of network, data and voice services for small businesses, large businesses and government agencies and wholesale customers. Additionally, Qwest participates in Networx, the largest communications services contract in the world, and is recognized as a leader in the network services market by a leading technology industry analyst firm.³⁵

The Commission previously denied Qwest's request for forbearance from the *Computer III* requirements in Phoenix because Qwest failed to present any evidence that application of the requirements is not necessary within the meaning of Section 10(a).³⁶

³³ *Cellular Telecommunications & Internet Association v. Federal Communications Commission*, 330 F. 3d 502, 509 (D.C. Cir. 2003).

³⁴ Qwest Petition at 11.

³⁵ See "Qwest Reports First Quarter 2009 Results," (Apr. 29, 2009), available at <http://news.qwest.com/index.php?s=43&item=23>.

³⁶ *Qwest 4 MSA Order* at ¶ 44.

The Commission should reach the same result here because again, Qwest has chosen to ask for the same relief with no showing that it is warranted.³⁷

IV. The Commission Cannot Find That Section 251(c) or Section 271 is Fully Implemented

The Commission is barred by statute from granting Qwest's request for forbearance from Section 251(c) and Section 271(c)(2)(B)(ii) at this time. Section 10(d) of the Communications Act, 47 U.S.C. §160(d), provides that the Commission may not forbear from applying the requirements of Sections 251(c) or 271 until it "determines that those requirements have been fully implemented." These are the only two sections of the statute for which full implementation is a precondition to the grant of forbearance.

A. Section 251(c)

In the *Omaha Forbearance Order*, the Commission stated that Section 251(c) had been fully implemented for all incumbent LECs nationwide "because the Commission has issued rules implementing section 251(c) and those rules have gone into effect."³⁸ The Commission further held that "incumbent LECs *comply* with Section 251(c) and the Commission's rules, but in this context are not properly said to be implementing the statutory provision."³⁹ This position, however, is inconsistent with the statutory language as well as Commission precedent. Although this issue was raised in the appeal of the *Omaha Forbearance Order*, the D.C. Circuit declined to rule on the arguments regarding

³⁷ See *Omaha Forbearance Order* at ¶¶16, 111 (where Qwest failed to demonstrate how forbearance from certain statutory provisions and Commission regulations would satisfy Section 10, Commission refused to compose an affirmative case for forbearance relief on Qwest's behalf).

³⁸ *Omaha Forbearance Order* at ¶53.

³⁹ *Id.* (emphasis in the original).

the inconsistency between the Commission's current interpretation of Section 251(c) and the Commission's prior rulings that state commissions, ILECs and competitive carriers all have a role to play in the implementation of Section 251(c) because the petitioners had failed to adequately raise the issue before the Commission.⁴⁰ The Commission needs to either explain the inconsistency or reconsider its previous determination that Section 251(c) has been fully implemented.

Section 251(d) provides that the Commission "within 6 months after February 8, 1996 shall complete all actions necessary to establish regulations to implement the requirements of this section." In contrast, in Section 10(d), Congress prohibits the Commission from forbearing from applying the requirements of Section 251(c) until it determines that those requirements have been "fully implemented." If Congress had intended to give the Commission authority to forbear from applying Section 251(c) as soon as rules implementing Section 251(c) had been adopted and gone into effect, there would be nothing for the Commission to "determine" in terms of whether the requirements of Section 251(c) had been fully implemented. Moreover, the use of the adverb "fully" to modify "implemented" in Section 10(d) clearly shows that Congress had more in mind than merely adopting regulations to implement the requirements of Section 251.⁴¹ The Commission itself previously agreed with this interpretation and so represented to the D.C. Circuit. In *ASCENT v. FCC*, the Court noted that

⁴⁰ *Qwest Corporation v. FCC*, 482 F.3d 471, 478 (D.C. Cir. 2007).

⁴¹ *See Rusello v. U.S.*, 464 U.S.16, 23 (1983) ("Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

But the Commission may not forbear from applying the requirements of Section 251(c). . . "until it determines that those requirements have been fully implemented." Because those requirements have not been fully implemented here, the FCC (*as it concedes*) may not forbear.⁴²

The Commission must adhere to its own precedent or explain its reasons for reversing course.⁴³ In adopting regulations pursuant to Section 251(c), the Commission correctly found that the adoption of rules was only the start of the process toward full implementation of Section 251(c) and that full implementation would require action not only by the Commission, but also by the state commissions, the ILECs and competitors. Specifically, in the *Local Competition Order*, the Commission concluded that its adoption of Section 251(c) rules was merely "the initial measure[] *that will enable the states and the Commission to begin to implement sections 251 and 252.*"⁴⁴ It further described its rules as a means to "facilitate administration of section 251 and 252"⁴⁵ Thus, it is clear that the Commission – consistent with the statutory language -- viewed its rules as the means, not the end, to full implementation of Section 251. The Commission viewed implementation of Section 251(c) as involving substantial activity by the Commission, the states and the ILECs well beyond the effective date of rules established by the FCC. Indeed, it found that "Section 252 generally sets forth the

⁴² *ASCENT v. FCC*, 235 F. 3d 662, 666 (D.C. Cir. 2001) (emphasis added).

⁴³ *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977). *See also, Columbia Broad. Sys., Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971)(FCC must explain its reasons for reversing its course; enumerate factual differences between similar cases; and explain the relevance of those differences to the purposes of the Act.)

⁴⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) at ¶6 ("*Local Competition Order*").

⁴⁵ *Id.* at ¶41.

procedures that state commissions, incumbent LECs and new entrants must follow to implement the requirements of Section 251 and establish specific interconnection arrangements.”⁴⁶

The Commission previously has found that the states have a substantial role to play in the full implementation of Section 251. It interpreted Section 251 as “creating parallel jurisdiction for the FCC and the states”⁴⁷ and as involving an “allocation of responsibilities”⁴⁸ between it and the states. The Commission, for example, found that while some of its rules may be self-executing, “in many instances, however, the rules we establish call on the states to exercise significant discretion and to make critical decisions through arbitrations and development of state-specific rules.”⁴⁹ It also found that in some cases its rules only “identify broad principles and leave to the states the determination of what specific requirements are necessary to satisfy those principles.”⁵⁰

Indeed, the Commission concluded that it was Congress’s intent for states to play a role in the implementation of Section 251. According to the Commission, “Congress envisioned complementary and significant roles for the Commission and the states with respect to the rates for section 251 services, interconnection, and access to unbundled

⁴⁶ *Id.* at ¶ 116. *See also AT&T v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999) (“It is the states that will apply the [Commission’s TELRIC pricing] standards and implement that methodology determining the concrete results in particular circumstances.”)

⁴⁷ *Id.* at ¶ 85.

⁴⁸ *Id.* at ¶ 41.

⁴⁹ *Id.*

⁵⁰ *Id.* at ¶ 67.

elements.”⁵¹ If Congress intended the states to have a significant role in implementing the statutory provision, then it could not have intended that the Commission’s action in promulgating rules and the passage of the effective date of those rules alone to be sufficient to deem Section 251(c) “fully implemented.” The Commission must consult with the state commissions to assess whether Section 251(c) has been fully implemented, rather than making a nationwide determination.

The Commission also recognized the important role the ILECs have to play in the implementation of Section 251. In particular, the Commission found that the ILECs have certain obligations under Section 251.⁵² In the *UNE Remand Order*, the Commission stated that “[b]ecause unbundled network elements have not been made fully available to competitors as the Commission expected in 1996, we do not yet know the extent to which competition will develop once all of the unbundling rules are actually implemented by the incumbent LECs.”⁵³ In the *Triennial Review Remand Order*, released just seven months before the adoption of the *Omaha Forbearance Order*, the Commission again recognized the role that State commissions, ILECs and CLECs must play in implementing Section 251:

We expect that incumbent LECs and competitive carriers will *implement* the Commission’s [unbundling determinations] as directed by Section 252 of the Act. Thus, carriers must *implement* changes to their interconnection agreements

⁵¹ *Id.* at ¶ 111.

⁵² *Id.* at ¶¶ 54, 307; *see also AT&T v. Iowa Utilities Board*, 525 U.S. at 371 (under the Telecommunications Act of 1996, ILECs are subject to a host of duties intended to facilitate market entry, including the duty to share their networks with competitors).

⁵³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) at ¶ 11, *reversed and remanded on other grounds sub nom. USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*UNE Remand Order*”) (emphasis added).

consistent with the conclusions in this Order. . . . Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to *implement* our rule changes. We expect that parties to the negotiating process will not unreasonably delay *implementation* of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unreasonable delay.⁵⁴

For the Commission to conclude less than a year later that it is the only “entity that ‘implements’ Section 251(c)”⁵⁵ and that the ILECs play no role in implementing Section 251(c) without explanation or analysis as to why it was abandoning its original interpretation of the statute fails to pass the reasoned decision making test. As the Court stated in *Columbia Broad. Sys., Inc. v. FCC*:

[W]hen an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.

Faced with two facially conflicting decisions, the Commission was duty bound to justify their co-existence. The Commission’s utter failure to come to grips with this problem constitutes an inexcusable departure from the essential requirement of reasoned decision making.⁵⁶

Section 251 cannot be “fully implemented” until Qwest fully satisfies its unbundling and other market-opening obligations imposed by the statute. Without input from the affected state commissions and the competitors for whom Section 251(c) was designed to facilitate entry, the Commission cannot possibly determine that Section 251(c) has been “fully implemented” simply because it has adopted implementing regulations and those regulations have gone into effect.

⁵⁴ *In the Matter of Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533 at ¶233 (2005) (“*TRRO*”) (emphasis added).

⁵⁵ *Omaha Forbearance Order* at ¶¶53-54.

⁵⁶ 454 F.2d at 1026.

The Commission's determination in the *Omaha Forbearance Order* that ILECs do not have a role in implementing Section 251(c) not only directly contradicts its prior precedent, but it is also nonsensical. Section 251(c) imposes specific duties on ILECs, including the duty to provide to requesting telecommunications carriers nondiscriminatory access to unbundled network elements. The Commission does not have the ability to actually provide requesting carriers access to unbundled network elements – *i.e.*, to implement a duty imposed on third parties -- only the ILECs do, as the Commission confirmed in the *UNE Remand Order*. The Commission cannot reverse its interpretation of Section 251(c) without acknowledging its prior precedent and providing a full explanation as to why that interpretation was incorrect.

The Commission's holding in the *Omaha Forbearance Order* that it is the only entity that "implements" Section 251 and that Section 251(c) has been "fully implemented" for all ILECs nationwide because the rules it has promulgated have gone into effect⁵⁷ cannot be reconciled with its prior interpretation of the statute. Reading the statute to mean that the Commission could grant forbearance from Section 251(c) as soon as its implementing regulations became effective – before any action with regard to those regulations may have been taken – eviscerates the very purpose of the rules and the statutory provision. The Commission should revisit its ruling in the *Omaha Forbearance Order* and consult with the Arizona Commission with respect to whether Qwest has fully implemented Section 251(c). Qwest's failure to provide any evidence with respect to its implementation of Section 251(c) warrants denial of its request for forbearance.

⁵⁷ *Omaha Forbearance Order* at ¶53.

B. Section 271

The Commission should also revisit its conclusion that Section 271 has been fully implemented once the Commission grants a BOC authority to provide interLATA service.⁵⁸ In the *Omaha Forbearance Order*, the Commission stated that:

With respect to the competitive checklist requirements of Section 271(c), however, these requirements first attach to the BOCs as obligations only after the BOCs have sufficiently opened their markets to competition under the standards set forth in section 271(c)(2)(B), and after the Commission has granted the BOC approval under 271(a) to provide in-region interLATA services.⁵⁹

If the Section 271 checklist obligations do not even attach to the BOCs until *after* the Commission has granted them interLATA operating authority, a determination that Section 271 has been fully implemented before the obligations attach – i.e., at the time the Commission grants that authority -- makes no sense. Given the large number of unbundled loops and EELs that competing carriers currently purchase from Qwest in the Phoenix MSA,⁶⁰ the Commission must examine whether Qwest will fully implement its obligation to provide unbundled access to loops and transport at just and reasonable rates pursuant to Section 271(c)(2)(B)(iv) and (v) before granting forbearance from the obligation to provide access at cost-based rates pursuant to 271(c)(2)(B)(ii). Based on the Omaha experience, there is no reason to believe that Qwest will do so.

The Commission thus far has failed to identify a pricing methodology that would yield just and reasonable rates for Section 271 elements. The Commission has also turned a deaf ear to a request by the Georgia Public Service Commission to clarify

⁵⁸ See, *In the Matters of Petition for Forbearance of the Verizon Telephone Companies, et al. Pursuant to 47 U.S.C. §160(c)*, WC Docket Nos. 01-338 *et al.*, Memorandum Opinion and Order, FCC 04-254 (rel. Oct. 27, 2004) at ¶15.

⁵⁹ *Omaha Forbearance Order* at ¶54.

⁶⁰ See Qwest Petition at 29 and Qwest Highly Confidential Exhibit 7.

whether states are preempted by federal law from setting just and reasonable rates for Section 271 elements.⁶¹ State Commissions that established rates for Section 271 elements have been routinely rebuffed by the Courts of Appeals, which have uniformly held that only the Commission has authority to set Section 271 rates and otherwise enforce that provision of the statute.⁶² The Commission's inaction has allowed the BOCs to avoid their Section 271(c)(2)(B)(iv) and (v) obligations to offer unbundled loops and transport by forcing their supracompetitively priced special access services on competitors as the only alternative once they have been relieved of the obligation to provide access pursuant to Section 251(c)(3). The Commission's failure to give any meaning to the BOCs' independent obligation to provide access to loops and transport pursuant to Section 271(c)(2)(B)(iv) and (v) precludes a finding that Section 271 has been fully implemented.

In the *TRRO*, the Commission reasoned that because incumbent carriers offered tariffed special access products since before the passage of the Telecommunications Act in 1996, Congress' enactment of Section 251(c)(3) at a time when special access services were already available to carriers in the local exchange market indicates that Section 251(c)(3) UNEs were intended as alternatives to special access.⁶³ The same is true with

⁶¹ The Georgia PSC filed a Petition three and one-half years ago asking the Commission to either clarify that it is not preempted by federal law from setting just and reasonable rates for Section 271 elements; if it is preempted, to declare the rates set by the Georgia Commission for Section 271 elements are just and reasonable; or set the rates itself for the Section 271 elements. See *In the Matter of Georgia Public Service Commission's Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*, WC Docket No. 06-90 (filed Apr. 28, 2006). The Commission has taken no action on the Petition.

⁶² See e.g., *Verizon New England, Inc. v. Maine Public Utilities Commission*, 509 F.3d 1 (1st Cir. 2007).

respect to Section 271(c)(2)(B)(iv) loops and Section 271(c)(2)(B)(v) transport. Those provisions were also enacted at a time when special access services were already available to carriers in the local exchange market and they also were intended as alternatives to special access. As the Commission stated in the *TRRO*, with respect to Section 251(c)(3)

It would be a hideous irony if the incumbent LECs, simply by offering a service, the pricing of which falls largely within their control, could utterly avoid the structure instituted by Congress to, in the words of the Supreme Court, “give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents’ property.”⁶⁴

It would also be a hideous irony if the ILECs, simply by offering their tariffed special services, the pricing of which falls largely if not wholly within their control, could utterly avoid their obligations to offer unbundled loops and transport pursuant to Section 271(c)(2)(B)(iv), and (v). The Commission must give meaning to those statutory provisions by establishing at the very least a pricing methodology before it can find that they have been fully implemented. The Commission must not forbear from enforcing Section 271(c)(2)(B)(ii) until it determines by reasoned decision making that Section 271(c)(2)(B)(iv), and (v) have been fully implemented.

V. Qwest Has Not Shown That It Is Entitled To Forbearance From Its Obligations To Offer Unbundled Loops and Transport

Should the Commission decline to revisit its finding that Section 251(c) and 271 have been fully implemented nationwide, it still must deny Qwest’s request for forbearance from its Section 251(c)(3) and 271(c)(2)(B)(ii) loop and transport unbundling obligations. Qwest has failed to demonstrate that forbearance from enforcement of its

⁶³ *TRRO* at ¶51.

⁶⁴ *TRRO* at ¶ 59.

loop and transport unbundling obligations will satisfy each of the three prongs of the Section 10(a) test. On the contrary, enforcement of these obligations remains necessary to ensure that both wholesale and retail prices are just, reasonable and nondiscriminatory. Moreover, forbearance would neither protect consumers, promote competitive market conditions nor enhance competition in the Phoenix MSA. Accordingly, the Commission must deny Qwest's Petition.

The Commission based its decision to forbear from Section 251(c)(3) in Omaha on a gross miscalculation of Qwest's future market behavior and the ability of retail competition to constrain wholesale rates. Where an ILEC seeks forbearance from its statutory wholesale obligations and the evidence demonstrates that competitors rely on the ILEC's wholesale inputs to provide service to their customers, as is true in Phoenix, the Commission should deny forbearance in the absence of evidence that there at least two alternative wholesale providers in addition to the ILEC capable of serving 100% of the customer locations in the geographic area for which forbearance is sought over their own networks and facilities. The Commission has previously found that "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory."⁶⁵ The charges, practices, classifications and regulations referenced in Section 10(a)(1) are not limited to retail charges, practices, classifications and regulations. On the contrary, the Commission may not grant forbearance absent a finding that enforcement of Section 251(c)(3) is not necessary to ensure that Qwest's *wholesale*, as well as retail charges,

⁶⁵ *Omaha Forbearance Order* at ¶67.

practices, classifications and regulations are just, reasonable and not unjustly discriminatory.

Qwest alleges that CLECs are utilizing its wholesale services to compete with it in every wire center in the Phoenix MSA.⁶⁶ Indeed, Qwest's data show that a significant number of lines served by competitors in Phoenix are provisioned over UNE loops and EELs purchased from Qwest.⁶⁷ The Commission cannot grant forbearance on the basis of this competition because to do so would eliminate the very competition that Qwest alleges justifies forbearance.⁶⁸

Qwest did not provide the volume of unbundled transport it sells to competitors in the Phoenix MSA even though such information is peculiarly within its control. Qwest's failure to produce this data constitutes an omission of proof that creates a presumption that the evidence would adversely impact its request for forbearance from the statutory obligation to provide access to unbundled transport.⁶⁹ For this reason, the Commission should deny Qwest's request for forbearance from the obligation to provide unbundled transport.

⁶⁶ Brigham Declaration at ¶37, n. 71.

⁶⁷ Brigham Declaration at ¶37.

⁶⁸ See *Omaha Forbearance Order* at ¶68, n.185 (“[g]ranting Qwest forbearance from the application of Section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance”).

⁶⁹ *International Union, UAW v. National Labor Relations Board*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (party's failure to produce relevant and important evidence of which he has knowledge and which is peculiarly within his control creates the presumption that the evidence would be unfavorable to his position).

A. Qwest Has Failed To Show The Existence Of Adequate Competition In The Wholesale Market

Qwest grossly exaggerates the level of wholesale competition it faces in the Phoenix MSA. Qwest lists a number of carriers that it describes as offering wholesale services to other communications carriers as an alternative to Qwest's wholesale services.⁷⁰ For the majority of the carriers listed, however, Qwest does not provide Phoenix specific network data, making it impossible for the Commission to determine whether or to what extent any of those carriers truly provide alternatives to Qwest's wholesale UNE loops and transport in Phoenix.⁷¹ To the extent that any of those competitors rely on Qwest UNEs to serve their own wholesale, as well as retail, customers, and there is no evidence to the contrary, granting Qwest forbearance from the obligation to provide UNE loops and transport will not satisfy any of the three prongs of Section 10(a).

The two carriers that Qwest alleges do provide last mile access in Phoenix – SRP Telecom and AGL Networks – serve only a fraction of the buildings in the MSA over

⁷⁰ Brigham Declaration at ¶¶49-63.

⁷¹ Brigham Declaration at ¶¶51-52 (quoting from the Cox Business website, but providing no information on Phoenix specific offerings); ¶55 (describing offerings of ELI while conceding that "ELI does not provide a local map of its Phoenix network"); ¶56 (describing AT&T's wholesale offerings but does not allege that AT&T provides last mile access over its own network in the Phoenix MSA); ¶¶57-58 (describing XO's wholesale offerings, but does not allege that XO provides competitive last mile access in the Phoenix MSA); ¶59 (describing Level 3's wholesale business but does not allege that Level 3 offers last mile access in the Phoenix MSA); ¶60 (describing tw telecom wholesale services but does not allege that tw offers last mile access over its own network facilities in Phoenix); ¶61 (describing AboveNet's network reach as including "over 1300 lit buildings and over 1.5 million fiber miles worldwide" but does not allege that any of those lit buildings are in the Phoenix MSA); ¶62 (describing 360 Network's wholesale VoIP offerings, but does not allege that 360 offers last mile access over its own network in the Phoenix MSA).

their own network facilities⁷² and do not provide a sufficient level of competition to warrant relieving Qwest of the statutory obligation to provide access to UNE loops and ports. In any event, Qwest's failure to disclose how many buildings its own network serves in the Phoenix MSA as a basis for comparison significantly dilutes the usefulness of the SRP and AGL data for purposes of determining the competitiveness of the wholesale market.⁷³

The Commission has previously determined that forbearance will not serve the public interest or promote competitive market conditions where, as here, it is likely to lead to an increase in prices for wholesale inputs that competitors need to provide service:

Specifically, we find that forbearance would be likely to raise prices for interconnection and UNEs (particularly those that may constitute bottleneck facilities), inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service. Because we find that the result of forbearance would be higher costs for competitive LECs which could impair their ability to enter and compete in local markets, we cannot find that forbearance would promote competitive market conditions.⁷⁴

⁷² Brigham Declaration at ¶53 (SRP Telecom's network reaches 50 commercial buildings) and ¶54 (AGL's on network building list names 64 specific in service or pending buildings in the Phoenix MSA). As of July 2006, the Government Accountability Office estimated that there were almost 8000 buildings in the Phoenix MSA with a demand of DS-1 or greater. See Government Accountability Office, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 (Nov. 2006) at 20.

⁷³ See *International Union, UAW v. National Labor Relations Board*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (party's failure to produce relevant and important evidence of which he has knowledge and which is peculiarly within his control creates the presumption that the evidence would be unfavorable to his position).

⁷⁴ *In the Matter of the 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, CC Docket 98-137, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 242 at ¶63 (1999).

The result of forbearance from Section 251(c)(3) in Omaha was a tremendous increase in the prices for the loops and transport that competitors needed to serve their customers, leading one competitor to exit the market and another to abandon its plans to enter the market.⁷⁵ There is no reason to believe that Qwest will not implement similar rate hikes in Phoenix if the Commission grants forbearance. For this reason, the Commission cannot find that forbearance would promote competitive market conditions.

In addition to being necessary to ensure that Qwest's wholesale rates remain just, reasonable and not unreasonably discriminatory and to preserve and enhance competition, enforcement of Section 251(c)(3) remains necessary to protect consumers. The Telecommunications Act of 1996 was designed to open all telecommunications markets to competition and thereby make available to consumers for the first time a choice of local exchange carriers. The competitors that have entered the local exchange market in the last thirteen years have spurred the development and deployment of many advanced services, including DSL and Ethernet, that were just not available before incumbent carriers had to compete for customers.

The Section 10(a) criteria make clear that forbearance shall not be granted when it would frustrate the basic statutory goals. The unavailability of unbundled loop and transport facilities penalizes not only competitors, but also consumers. Qwest has shown that it is capable of pricing its competitors out of the Omaha market. It will do the same if given the opportunity in Phoenix. Depriving consumers of the competitive discipline on retail rates, the competitive spur to innovation and the competitive choice of carriers

⁷⁵ Comments on Remand at 5-10.

and services made possible when Section 251(c)(3) is enforced would be contrary to the goals of the Telecommunications Act. For this reason, forbearance must be denied.⁷⁶

B. The Retail Residential Market Is A Duopoly

Qwest has also failed to make an adequate showing of competition in the retail market to justify forbearance. At best, residential customers in the Phoenix MSA have a choice of Qwest's local telephone service or Cox Cable's local telephone service.

Qwest contends that residential customers have access to a wide range of competitive alternatives for affordable local telephone service in addition to Cox, including wireline CLECs, wireless carriers and over the top VoIP providers.⁷⁷ Cox, however, is the only wireline competitor Qwest has identified in the retail residential market that does not rely on Qwest's wholesale inputs to serve its customers. None of the CLECs Qwest names serve residential customers over their own networks. Instead, AT&T and Verizon both use Qwest's Local Services Platform ("QLSP"), its UNE-P replacement product, to serve their residential customers.⁷⁸ Arizona Dial Tone, USTel and DPI Teleconnect resell Qwest's retail residential service.⁷⁹ Because Qwest sets the

⁷⁶ *Omaha Forbearance Order* at ¶61 (forbearance from enforcement of loop and transport unbundling obligations warranted only where Qwest faces sufficient competition to ensure that the interests of consumers and the goals of the Act are protected).

⁷⁷ Qwest Petition at 13.

⁷⁸ Brigham Declaration at ¶¶22-23.

⁷⁹ *Id.* at ¶24. While Qwest alleges that there are other unnamed CLECs providing residential service in the Phoenix MSA (Qwest Petition at 23), its failure to identify them makes it impossible to verify the allegation. In any event, it appears that some or all of those CLECs use Qwest wholesale inputs to provide service. Qwest Petition at 23, n. 79.

rates, terms and conditions for its QLSP⁸⁰ and resale services,⁸¹ carriers using these services cannot discipline Qwest's retail rates. Lines served via QLSP and resale must be attributed to Qwest, and not the competition, when calculating Qwest's retail market share.

As discussed below, neither wireless nor over-the-top VoIP services should be included in the competitive analysis. Qwest has failed to present reliable, verifiable evidence of the degree to which Phoenix MSA residential customers have substituted wireless or over-the-top VoIP service for their wireline service.

1. Wireless and Over-The-Top VoIP Are Not Wireline Substitutes

As it has done in the past,⁸² the Commission should reject Qwest's contention that it faces substantial competition from wireless and over-the-top VoIP providers and that such competition should be considered in the forbearance analysis. Qwest has again failed to present reliable Phoenix MSA specific evidence to support its claims.⁸³ The Commission has held that mobile wireless service should be included in the local services market *only* to the extent that it is used as a complete substitute for all of a consumer's voice communications needs.⁸⁴ In its decision denying Qwest's earlier request for forbearance in Phoenix, the Commission specifically directed that Petitioners, like Qwest,

⁸⁰ Pricing for the unbundled switching component of the QLSP product has been deregulated allowing Qwest complete discretion in setting the rate for the bundled product.

⁸¹ Qwest sets the retail rate from which the avoided cost resale discount is taken.

⁸² *Qwest 4 MSA Order* at ¶¶16, 19-22.

⁸³ Qwest Petition at 10-16; Brigham Declaration at ¶¶36-49

⁸⁴ *Qwest 4 MSA Order* at ¶19.

that seek to rely on mobile wireless substitution (or wireline cord cutting) to support forbearance relief “should submit complete and reliable data that is geographically specific to the areas for which forbearance is sought.”⁸⁵ Despite this direction, Qwest again has chosen not to present complete, reliable MSA specific evidence. Instead, it cites to the National Center for Health Statistics (“CDC”) survey that presents wireless substitution data on a *nationwide basis* for the period January to June 2008.⁸⁶ It also asks the Commission to make assumptions about Phoenix MSA specific data from the CDC’s estimates of wireless only households in the *state of Arizona* for the period July to December 2007,⁸⁷ without acknowledging the Commission’s previous finding that the CDC’s state specific data is unreliable for evaluating wireless market share in the Phoenix MSA.⁸⁸ The Commission should decline Qwest’s invitation.

Qwest also cites again to a report by Nielsen Mobile on wireless substitution in the Phoenix metro area.⁸⁹ The report states that the wireless substitution rate in the

⁸⁵ *Qwest 4 MSA Order* at ¶22.

⁸⁶ See Qwest Petition at 17, Brigham Declaration at ¶14, citing Centers for Disease Control and Prevention, National Center for Health Statistics, Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January –June 2008, released December 17, 2008 (“CDC study.”)

⁸⁷ Qwest Petition at 18, Brigham Declaration at ¶15, citing Centers for Disease Control and Prevention, National Center for Health Statistics, Wireless Substitution: State-level Estimates from the National Health Interview Survey, July-December 2007, released March 11, 2009.

⁸⁸ *Qwest 4 MSA Order* at ¶21.

⁸⁹ Qwest Petition at 19, Bingham Declaration at ¶16 and Exhibit 4; see also July 21, 2008 Letter from Daphne E. Butler, Qwest to Marlene H. Dortch filed in WC Docket No. 07-97.

Phoenix metro area was 17.8% in the first quarter of 2008.⁹⁰ The Commission previously rejected Nielsen's estimate of wireless substitution in Phoenix as unreliable because Qwest failed to provide a description of the methodology used to prepare the estimate.⁹¹ While the report submitted with Qwest's current Petition is more complete than Qwest's earlier submission, it still does not provide the detail necessary to make an informed evaluation of the validity of its estimate of wireless substitution in Phoenix and should be rejected. First, the Nielsen report relies heavily on the CDC's estimates of wireless substitution,⁹² which the Commission has already determined are not reliable for purposes of estimating market share in the Phoenix MSA. Secondly, Nielsen reports results for the "Phoenix metro area," not the Phoenix MSA, for which Qwest seeks forbearance. Thirdly, the report states that it is based on research "from a suite of research assets,"⁹³ but provides no details on the survey methodology used in any of those "research assets," making it impossible to determine their validity for estimating market share. For these reasons, the Commission must again reject the Nielsen data.⁹⁴

In an effort to address the Commission's concerns regarding its previously submitted non-MSA specific wireless substitution evidence, Qwest commissioned

⁹⁰ Brigham Declaration at ¶16 and Exhibit 4 at 6. While putting forth the Nielsen study as a reliable estimate of wireless only households (17.8%) in Phoenix, Qwest also extrapolates from the CDC study to contend that well over 22% of Phoenix MSA households are wireless only. Brigham Declaration at ¶15. It also cites to the Market Strategies study (Exhibit 5) to contend that 25% of Phoenix MSA households are wireless only and this is the figure that it uses in calculating its market share. See Appendix B.

⁹¹ *Qwest 4 MSA Order* at ¶21, n. 78.

⁹² Exhibit 4 to the Brigham Declaration at 2, 4.

⁹³ Exhibit 4 to the Brigham Declaration at 4.

⁹⁴ See *Qwest 4 MSA Order* at ¶21, n. 78.

Market Strategies International to conduct a study to estimate the percentage of wireless only households in the Phoenix MSA.⁹⁵ The Market Strategies study alleges that 25% of Phoenix MSA households have cut the cord and do not subscribe to wireline service.⁹⁶ The methodology used to arrive at this estimate, however, has several flaws and does not provide a reliable basis for determining wireless only market share in the Phoenix MSA.

First, the sample size was heavily weighted in favor of wireless only households. Of the 791 telephone interviews conducted, over 48% (383) were conducted with wireless only households.⁹⁷ Since the estimate that 25% of Phoenix MSA households are wireless only is based on the survey results and wireless households were surveyed at a disproportionately high rate, it is likely that the survey results are skewed in favor of wireless only households. The fact that the Market Strategies' estimate of wireless only households (25%) is so much higher than the other estimates submitted by Qwest supports this hypothesis.⁹⁸ Contrary to Qwest's allegation that the Market Strategies study "corroborate[s]" Nielsen's findings, the Market Strategies estimate of wireless substitution is *40% higher* than Nielsen's, which is far beyond the +/- 5% confidence interval claimed for the study.⁹⁹

⁹⁵ Brigham Declaration at ¶17.

⁹⁶ Brigham Declaration at ¶17 and Exhibit 5.

⁹⁷ Brigham Declaration Exhibit 5 at 4.

⁹⁸ See e.g., the Nielsen estimate (17.8% for the Phoenix Metro area) and the CDC estimate (18.9% for the State of Arizona).

⁹⁹ Brigham Declaration at ¶17 and Exhibit 5 at 4.

Qwest's attempt to explain away the huge discrepancy in the Nielsen and Market Strategies estimates is unavailing.¹⁰⁰ The Nielsen estimate was based on data from the first quarter of 2008.¹⁰¹ The Market Strategies estimate was derived from interviews conducted in September and October of 2008.¹⁰² In order to bring the Nielsen and Market Strategies estimates into line, Qwest suggests that the Commission tack an additional 3-4% on to the rate Nielsen projected for Phoenix for the first quarter to reflect Nielsen's estimate of the *annual* growth rate of wireless substitution, even though the Market Strategies study was based on data collected only six months later. Qwest also suggests that the Commission tack another 1.3% on to the Nielsen rate to reflect Nielsen's estimate that the wireless substitution rate in Phoenix is 1.3% higher than the national average.¹⁰³ There is no rational basis for either of these upward adjustments.

Secondly, Market Strategies does not explain how it selected the 791 households that were interviewed from the adjusted frame of 1,082,000 landline households and 1,230,000 wireless households.¹⁰⁴ Instead, it states merely that "[s]amples were selected from each frame to be part of this study"¹⁰⁵ and that it generated a "representative" list of wireless and wireline telephone numbers to survey.¹⁰⁶ Market Strategies provides no

¹⁰⁰ Qwest Petition at 19.

¹⁰¹ Brigham Declaration Exhibit 4 at 6.

¹⁰² Brigham Declaration at ¶17.

¹⁰³ Qwest Petition at 19.

¹⁰⁴ Brigham Declaration Exhibit 5 at 14.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 3.

information with respect to how it determined whether a telephone number was “representative” or not, or what it was representative of. Without such information, neither the reliability nor the “representativeness” of the survey results can be verified.

Thirdly, Market Strategies does not provide the survey questions that were used in the interviews. Without the questions, it is impossible to determine the reliability of the survey results. Market Strategies contends that in a 5-minute telephone interview with 791 households, it was able to determine whether the respondent subscribed to landline service only, wireless service only or both; for respondents who subscribed to both, the percentage of local calls and the percentage of long distance calls made via wireless phone and the percentage made via landline phone; whether the respondent was Caucasian, African-American, American Indian or Alaskan Native, Asian, Hawaiian/Pacific Islander, Hispanic/Mexican, or other ethnicity; the respondent’s age; the respondent’s household income; the number of people living in the respondent’s household; and the identity of the respondent’s wireless carrier.¹⁰⁷ That is a lot of personal information to be gleaned in a 5 minute telephone interview.

Because Qwest has failed to provide a full description of how the Market Strategies study was conducted or sufficient detail about the methodology used to arrive at the estimate of a 25% wireless substitution rate in the Phoenix MSA, the Commission cannot possibly use the Market Strategies estimate in calculating Qwest’s market share.¹⁰⁸

¹⁰⁷ *Id.* at 3, 5-12.

¹⁰⁸ *Qwest 4 MSA Order* at ¶¶21-22.

The Commission should also reject Qwest's conclusory allegation that the "existence of wireless alternatives constrains Qwest's ability to raise prices for wireline basic exchange service above market levels because such an increase would likely cause many customers to replace their wireline service with a wireless phone."¹⁰⁹ Qwest offered no evidence that any wireless offering in Phoenix constrains its ability to implement rate increases or prevents the exercise of market power. While Qwest alleges that wireless services should be considered substitutes for wireline services, it failed to show any cross elasticity of demand – *i.e.*, how much, *if any*, switching between wireless and wireline services is due to changes in price. "If customers switch between wireline and wireless access but *not* in response to price changes, then wireless is not a close substitute and cannot prevent the exercise of market power in the wireline market."¹¹⁰ In the absence of any evidence that wireless offerings in the Phoenix MSA in fact constrain Qwest's pricing, wireless and wireline should not be considered substitutes.

With respect to over-the-top VoIP service, the Commission should again find that Qwest has failed to present direct evidence of the degree to which consumers in the Phoenix MSA view over-the-top VoIP service as a complete (or even close) substitute for wireline telephone service.¹¹¹ Qwest presented no evidence of subscribership rates for over-the-top VoIP service in the Phoenix MSA.¹¹² Instead, it cites statistics for

¹⁰⁹ Brigham Declaration at ¶20.

¹¹⁰ See Declaration of Dr. Michael D. Pelcovits filed by Cavalier Telephone and TV in WC Dockets No. 08-24 and 08-49 on April 21, 2009 at 10 (emphasis in original).

¹¹¹ *Qwest 4 MSA Order* at ¶17.

¹¹² Brigham Declaration at ¶27 (noting that it is difficult to obtain accurate subscribership information for VoIP services).

broadband subscribership in the state of Arizona and forecasts of VoIP subscribership nationwide.¹¹³ The Commission has previously found such forecasts completely unreliable for purposes of analyzing competition and market share.¹¹⁴ Qwest has provided no reason for the Commission to find differently here.

As it has done before when Qwest failed to provide reliable data concerning the full substitutability of over-the-top VoIP and wireless services for wireline services,¹¹⁵ the Commission should reject Qwest's request to factor competition from wireless and VoIP providers into the forbearance analysis for the Phoenix MSA.

2. Qwest Has Grossly Understated Its Residential Market Share

In calculating its retail residential market share, Qwest erroneously attributed the resale and QLSP lines to the competitive side of the equation.¹¹⁶ Because these services are provided wholly over Qwest's own network, they do not compete with Qwest's retail service and should be included in Qwest's market share, not the competitors' market

¹¹³ Brigham Declaration at ¶¶27-28.

¹¹⁴ *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433 at ¶49, n.135 (2005) ("*Verizon/MCI Merger Order*") (rejecting analyst projections of national market share as unreliable and likely masking variations in market share among narrower geographic regions).

¹¹⁵ *Qwest 4 MSA Order* at ¶22; see also *Omaha Forbearance Order* at ¶72; *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. §160(c)), For Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Study Area*, WC Docket 06-109, Memorandum Opinion and Order, FCC 07-149 at ¶28 (rel. Aug. 20, 2007) (Commission declined to include VoIP service and wireless service as close substitute products in its analysis of the wireline market in the absence of data justifying the inclusion of such services in the analysis).

¹¹⁶ Brigham Declaration Exhibit 14.

share. Qwest also erroneously discounted its market share by the Market Strategies estimate of 25% wireless substitution in the Phoenix MSA.¹¹⁷ Assuming that Qwest's estimate of the number of residential lines served by Cox is accurate,¹¹⁸ Qwest still retains more than a 50% share of the residential market. In the absence of any evidence of facilities-based competition in the residential market other than that provided by Cox, the Commission cannot determine that continued enforcement of Qwest's wholesale obligations is not necessary to constrain rates, protect consumers or promote competitive entry.

As COMPTTEL shows in its Comments on Remand, duopoly market conditions produce high prices, frustrate innovation and can lead to tacit collusion by providers.¹¹⁹ Two facilities-based retail alternatives to Qwest are the minimum necessary to discipline Qwest's retail rates, terms and conditions of service. In the interest of protecting consumers and promoting and enhancing competitive market conditions, the Commission cannot grant forbearance in a retail market characterized by duopoly.

C. Qwest Has Not Provided Reliable Evidence Of Its Share of The Business Market

Although it claims that it is experiencing intense competition in the business market,¹²⁰ Qwest has failed to present reliable evidence of its own share of business lines in Phoenix. In an attempt to quantify the level of competition in the business market, Qwest commissioned Harte-Hanks to conduct a survey. According to Qwest, Harte-

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ COMPTTEL Comments on Remand at 21-26.

¹²⁰ Qwest Petition at 26; Brigham Declaration at ¶32.

Hanks interviewed “over 1,500 business customers in the Phoenix MSA to determine what telecommunications services the customers are purchasing, and which carrier(s) the customer are purchasing the services from.”¹²¹ Qwest did not provide the actual results of the survey, but instead produced only a three line chart that allegedly contains “Data From Harte-Hanks survey of Business Customers in Phoenix MSA.”¹²² Qwest provides no description of the methodology Harte-Hanks used to conduct the study, how the interviewees were selected, what they were asked or any other information to support the significance or reliability of the study. Even if the Commission were to give any credence to the unsubstantiated survey, which it should not, the data on which Qwest relies cannot be interpreted as anything close to a measure of facilities-based competition. Asking retail customers to identify the telecommunications carrier from which they purchase service would provide no indication as to whether Qwest is the underlying wholesale provider of the service or whether the carrier serves the customer over its own network and facilities. Without such information, it is impossible to estimate the percentage of the market served by facilities-based carriers using their own last mile and transport facilities.¹²³ The Commission should reject the Harte-Hanks data as unreliable and unverifiable for purposes of estimating Qwest’s share of the business market.

While Qwest asserts that it faces stiff competition in the business market from Cox Cable, CLECs and VoIP providers and bemoans the decline in retail access lines it

¹²¹ Qwest Petition at 27; Brigham Declaration at ¶33.

¹²² Exhibit 6 to Bingham Declaration.

¹²³ This is not a theoretical concern. As Qwest’s Highly Confidential Exhibit 7 shows, a significant number of CLEC business lines are provisioned using Qwest’s UNE loops and EELs.

has sustained,¹²⁴ it reported strong revenue growth in the business market in 2008. In the March 18, 2009 Letter to Shareholders accompanying the 2008 Annual Report, Qwest's Chairman and Chief Executive Officer stated:

In a turbulent year that ended with a worldwide financial crisis, I am pleased to report that Qwest reported solid financial results in 2008, including growth in our strategic products

* * *

In a year when many in our industry reported declines in business revenues, Qwest reported 5 percent growth in our Business Market segment.

* * *

Even in the face of tough economic times and pressure on our revenues, in the fourth quarter of 2008, we reported improving profitability in each of our three strategic business units – Business Markets, Mass Markets and Wholesale Markets.¹²⁵

The other evidence on which Qwest relies to show competition in the business market – fiber network maps, the number of fiber route miles competitors have deployed and materials from competitors' websites -- has been rejected by the Commission in the past as unpersuasive.¹²⁶ The Commission should do the same here. In the absence of any reliable evidence in the record to reasonably assess Qwest's or any other last mile facilities-based provider's market share in the business market, the Commission must deny Qwest's request for forbearance from Section 251(c)(3).¹²⁷

¹²⁴ Qwest Petition at 6, 27-32; Brigham Declaration at ¶¶3, 32-48.

¹²⁵ March 18, 2009 Letter to Shareholders accompanying the Qwest 2008 Annual report, available at <http://www.qwest.com/about/investor/events/stockholder2009/index.html>.

¹²⁶ Qwest 4 MSA Order at ¶ 39.

¹²⁷ Qwest 4 MSA Order at ¶¶33, 40.

CONCLUSION

For the foregoing reasons, COMPTTEL respectfully requests that the Commission deny Qwest's Petition for Forbearance from unbundling, dominant carrier and *Computer III* regulation in the Phoenix MSA.

September 21, 2009

Respectfully submitted,

/s/

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**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petitions of the Verizon Telephone Companies)	WC Docket No. 06-172
For Forbearance Pursuant to 47 U.S.C. § 160(c))	
In the Boston, New York, Philadelphia,)	
Pittsburgh, Providence, and Virginia Beach)	
Metropolitan Statistical Areas)	
)	
In the Matter of)	
)	
Petitions of Qwest Corporation for Forbearance)	WC Docket No. 07-97
Pursuant to 47 U.S.C. §160(c) in the Denver,)	
Minneapolis-St. Paul, Phoenix and Seattle)	
Metropolitan Statistical Areas)	

COMMENTS OF COMPTTEL

September 21, 2009

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SUMMARY

The Commission properly denied Verizon's and Qwest's Petitions for Forbearance from their statutory unbundling obligations, dominant carrier regulation of their access services and *Computer III* requirements in 10 of the largest Metropolitan Statistical Areas in the country. On remand, the Commission has the opportunity to articulate a workable and meaningful standard for determining whether there is sufficient competition in a market to relieve an incumbent LEC of its wholesale obligation to provide access to unbundled loops and transport at cost-based rates.

The Commission has asked whether it should depart from the market analysis approach used in the Omaha, Nebraska UNE forbearance proceedings. COMPTTEL submits that it should depart from that approach. Although Qwest sought forbearance from enforcement of a *wholesale* obligation in Omaha, the Commission granted forbearance based on the presence of a single facilities-based competitor in the *retail* market and the absence of any competition in the wholesale market. Once Qwest was freed from the obligation to provide access to UNE loops and transport in Omaha, it declined to negotiate rates for alternative products and referred requesting carriers to its special access products priced 30% to 151% higher than the equivalent UNEs. The supracompetitive rate increases forced one carrier to leave the market and another to abandon plans for entry. Contrary to the Commission's prediction, forbearance from enforcement of Qwest's wholesale obligations neither promoted competitive market conditions nor enhanced competition in Omaha. The Commission needs to candidly acknowledge that its predictive judgment in Omaha turned out to be not only overly

optimistic, but clearly erroneous. Both Section 10 of the Act and the public interest demand that the Commission apply a more exacting market share standard in order to gauge whether a market is so competitive that it is no longer necessary to enforce the network access obligations that Congress imposed on incumbent local exchange carriers.

The Commission's forbearance analysis must identify and evaluate the relevant product markets, evaluate the existence of actual facilities-based competition in the relevant product and geographic markets and calculate the incumbent's actual market share. Potential competition should not factor into the forbearance analysis at all. Where, as here, an ILEC petitions for relief from its Section 251(c)(3) wholesale obligations, the Commission must examine the extent of competition in both the wholesale and retail markets. If either or both are characterized by monopoly or duopoly, forbearance must be denied. In addition, where the evidence shows that competitors rely heavily on unbundled loops and transport purchased from the ILEC to serve their customers, the Commission should not grant forbearance in the absence of evidence that (1) the ILEC holds less than a 50% retail market share (determined separately for the residential and business markets) in the geographic area for which forbearance is sought and (2) there are at least two alternative wholesale providers in addition to the ILEC capable of serving 100% of the customer locations in the geographic market solely over their own facilities.

The evidence in these dockets showed that intramodal competitors in each of the 10 markets rely heavily on access to Verizon's and Qwest's last mile network facilities, including UNEs, and that there are no significant alternative sources of wholesale inputs in any of the 10 markets. The evidence also showed that the cable operator was the only

competitor that had deployed significant last mile network facilities in any of the markets and that the cable networks served primarily the residential, not the business, market. The evidence also showed that Verizon and Qwest remain dominant in terms of market share in each of the MSAs. For all of these reasons, the Commission reached the right result in denying Verizon and Qwest forbearance from their statutory obligations to provide access to UNE loops and transport.

Commission to explain why it had departed from its past practice and “applied a per se market share test that considered only actual, and not potential, competition in the marketplace”³ to determine whether the markets at issue were sufficiently competitive to warrant forbearance from enforcement of the statutory obligation to provide access to unbundled loops and transport at cost-based rates.

The Commission has asked for comment on whether it should depart from its recent precedent regarding marketplace analysis in forbearance petitions,⁴ including the *Omaha Forbearance Order*⁵ and the *ACS UNE Forbearance Order*.⁶ COMPTTEL submits that the Commission should depart from this precedent and should apply a more meaningful and effective standard in determining whether a market is competitive enough to relieve an ILEC of its statutory wholesale unbundling obligations. That standard must reflect a careful evaluation of the relevant product market(s), a careful and realistic evaluation of the existence of facilities-based competition in the relevant product and geographic markets and a careful calculation of the ILEC’s actual market share. Neither projected “potential” competition nor “predictive judgment” should play any role in the analysis. In markets such as those at issue here where

³ *Verizon Telephone Companies v. FCC*, 2009 U.S. App. Lexis 3269 at 27.

⁴ Public Notice, Wireline Competition Bureau Seeks Comment on Remands of *Verizon 6 MSA Forbearance Order* and *Qwest 4 MSA Forbearance Order*, DA 09-1835 (rel. Aug. 20, 2009) at 3 (“Remand Public Notice”).

⁵ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Omaha Forbearance Order*”), *aff’d. sub nom.*, *Qwest Corporation v. FCC*, 482 F. 3d 471 (D.C. Cir. 2007).

⁶ *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007) (“*ACS UNE Forbearance Order*”), *appeals dismissed sub nom. Covad Communication Group, Inc. v. FCC*, Case Nos. 07-71076 *et al.* (9th Cir. 2007).

multiple competitors are dependent upon the ILECs for the last mile loop and transport needed to serve their customers, the Commission should not grant ILECs forbearance from their wholesale obligations in the absence of evidence that there are alternative suppliers to the ILEC in the wholesale market.

Specifically, when an ILEC seeks to be relieved of its statutory UNE wholesale obligations and there are competitors in the market that use the ILEC's UNEs to provide service to their own customers, the Commission should only grant forbearance where the ILEC demonstrates that (1) its retail market share is less than 50% and only lines served by a competitor solely over non-ILEC network and facilities are attributed to the competition *and* (2) there are at least two alternative facilities-based wholesale providers in addition to the ILEC whose networks reach and are capable of serving 100% of the customer locations in the geographic area for which forbearance is sought.

Pursuant to Section 10(a) of the Communications Act, the Commission may only forbear from enforcing an incumbent LEC's unbundling obligations under Section 251(c) if it determines that enforcement is not necessary to ensure that the ILEC's rates, charges, practices and regulations are just, reasonable and nondiscriminatory, to protect consumers and to promote competitive market conditions.⁷ In determining whether competition in a particular geographic market is sufficient to constrain the ILEC's rates and terms of service and protect consumers, the Commission must realistically weigh the extent to which forbearance from enforcement of the ILEC's obligation to provide access to UNEs is likely to deprive consumers of a choice of service providers, reduce the number of service providers currently available to consumers, increase the cost consumers will have to pay for service and otherwise adversely impact

⁷ 47 U.S.C. §160(a).

competitive market conditions. The Commission correctly determined that neither Verizon nor Qwest met its burden of showing that competition was sufficient in any of the 10 markets to avoid these negative impacts.

I. The Commission Should Acknowledge That It Made A Mistake In Omaha

Consistent with the Court's instruction, the Commission must explain why it took a different path in assessing the level of competition sufficient to warrant forbearance in the *Verizon 6 MSA* and *Qwest 4 MSA Orders* than it took in the *Omaha Forbearance Order*. The Commission should just candidly concede that it made a mistake in Omaha. Experience has shown that the forbearance standard the Commission used to grant Qwest forbearance from its statutory obligations to provide access to unbundled loops and transport pursuant to Sections 251(c)(3) and 271(c)(2)(B)(ii) in Omaha, Nebraska worked neither to promote nor enhance competition as Section 10 of the Communications Act requires. Instead, application of that standard, which relied upon competition provided in the residential market by a single facilities-based cable provider, as well as "potential competition" that the Commission predicted would develop,⁸ resulted in at least one competitor leaving the Omaha market and another deciding not to enter. The Commission now has the opportunity to correct its error. As the Court noted:

Indeed, it may be reasonable in certain instances for the FCC to consider an ILEC's possession of [redacted] percent, or any other particular percentage, of the marketplace, as a key factor in the agency's determination that a marketplace is not sufficiently competitive to ensure its competitors' abilities to compete. It may also be reasonable for the FCC to consider only evidence of actual competition rather than actual and potential competition. Nevertheless, it is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past.⁹

⁸ *Omaha Forbearance Order* at ¶69.

⁹ *Verizon Telephone Companies v. FCC*, at 26.

Both Section 10 of the Act and the public interest demand that the Commission apply a more exacting standard than was applied in the *Omaha Forbearance Order* before determining that a market is so competitive that it is no longer necessary to enforce the provisions enacted by Congress to promote the development of competition and afford consumers a choice of service providers, including Section 251(c)(3) and Section 271(c)(2)(B)(ii). Getting that standard right is critically important to the success of the Administration's broadband efforts.

A. The Aftermath of Forbearance in Omaha

Although the Commission found that the record in the Omaha Forbearance proceeding “does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market,”¹⁰ it nonetheless found that the public interest would be served by forbearing from enforcing Qwest's statutory duty to make UNE loops and transport available to competing carriers on a wholesale basis. It also found that forbearance “will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b).”¹¹ The Commission premised the forbearance relief granted to Qwest, at least in part, on its predictive judgment that “Qwest will not react to our decision here by curtailing wholesale access to its analog DS0-, DS1-, or DS3- capacity facilities,” that competitors would continue to have access to unbundled loops and transport pursuant to Section 271(c)(2)B(iv) and (v) and that market incentives would prompt Qwest to make its network available to competitors at competitive rates and terms.¹² Contrary to the Commission's predictions, at least two competitors – Integra Telecom and McLeodUSA -- have conclusively

¹⁰ *Omaha Forbearance Order* at ¶¶67.

¹¹ *Id.* at ¶75.

¹² *Id.* at ¶¶62, 79, 83.

demonstrated that Qwest did *not* make loops or transport available in Omaha on competitive rates or terms once it was granted forbearance and that forbearance did not promote competitive market conditions or enhance competition among providers of telecommunications services.¹³

Integra Telecom, Inc., a competitive local exchange carrier that has served customers in Qwest territories since 1998, conducted a market analysis of the Omaha market in mid-2005 and concluded that conditions were favorable for entry. Integra's conclusion was based upon the expectation that it would be able to obtain UNE loops and transport from Qwest. After the Commission relieved Qwest of the obligation to provide access to UNE loops and transport in nine wire centers, Integra reversed course and determined that it was not economically feasible to enter the Omaha market without access to UNEs throughout the market.¹⁴

In a Petition for Modification of the *Qwest Omaha Forbearance Order* filed more than two years ago, McLeodUSA detailed its post-forbearance experience with Qwest in Omaha. That experience shows that the Commission's predictive judgments were wide of the mark -- market incentives did not prompt Qwest to make unbundled loops and transport available to competitors on competitive rates and terms nor did the grant of forbearance enhance competition. The only high capacity loops and transport that Qwest has continued to make available to competitors in Omaha are special access services from its FCC Tariff No. 1. These tariffed special access services are not wholesale services, but are equally available to both end users and to carriers. In 2006, Qwest's average rate of return on its special access services was a whopping

¹³ See McLeodUSA Telecommunications Services, Inc.'s Petition for Modification of the Qwest Omaha Forbearance Order filed in WC Docket No. 04-223 on July 23, 2007 ("Petition for Modification"); Comments of Integra Telecom, Inc. and Affidavit of Dudley Slater filed in WC Docket No. 06-172 on March 5, 2007.

¹⁴ Affidavit of Dudley Slater, *supra*.

132%.¹⁵ The supracompetitive special access rates Qwest demanded for the essential inputs McLeodUSA needed to serve its customers caused McLeodUSA to exit the Omaha market.¹⁶

McLeod demonstrated that the Commission's predictive judgment that market incentives would prompt Qwest to make loops and transport available to other carriers at competitive rates and terms in the wake of its Omaha forbearance decision was not only overly optimistic, but also clearly erroneous. Qwest declined to negotiate rates, terms and conditions for the loops and transport it continues to be obligated to provide pursuant to Section 271 of the Act, 47 U.S.C. §271, and instead presented McLeod with take-it-or-leave-it template agreements and uneconomic special access pricing.¹⁷ The non-negotiable rates Qwest offered McLeod involved monthly recurring price increases over the UNE rates ranging from 30% for standalone DS0 loops¹⁸ to 138% for DS1 loops in one wire center to 151.5% for DS1 loops in five wire centers and to 165% for DS1 loops in the remaining three wire centers.¹⁹ The increase in non-recurring

¹⁵ See *In the Matter of Special Access Rates For Price Cap Local Exchange Carriers*, CC Docket No. 05-25, Comments of the AdHoc Telecommunications Users Committee at Appendix 1, page A-1 (filed Aug. 8, 2007).

¹⁶ See McLeodUSA Petition for Modification; *In the Matter of the Application of McLeodUSA Telecommunications Services, Inc., Hiawatha, Iowa, Seeking To Cease Providing Local Exchange Voice Services In Nebraska Wire Centers*, available at <http://www.psc.ne.US/home/NPSC/communication/order/Local%20Competition/C3922080528.pdf>; Comments Invited On Application of McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services To Discontinue Domestic Telecommunications Services, WC Docket No. 09-107, DA 09-1389 (rel. Jun. 22, 2009).

¹⁷ Eben Declaration filed with the McLeod Petition for Modification at ¶¶5 and 25 and Exhibits 1 and 3.

¹⁸ The 30% price increase over the UNE rates is Qwest's "commercial agreement" price for stand alone DS0 loops. McLeod Eben Declaration at Exhibit 1.

¹⁹ McLeod Eben Declaration at ¶¶7-8 and Exhibit 1 at 3.

charges for DS1 loops – 360% -- is even more phenomenal.²⁰ In order to avoid operating at a loss, competitors would have no choice but to pass the increased rates they must pay for essential inputs on to their customers or exit the market. When forbearance leads to such huge rate increases due to the absence of competition, it can hardly be said that enforcement of Sections 251(c)(3) and 271(c)(2)(B)(ii) is not necessary to constrain rates, protect consumers or promote competitive market conditions.

Despite the Commission's predictions of the competitive conditions that would prevail in the wholesale market post-forbearance, Qwest's ability to unilaterally increase rates for essential inputs to such levels is not reflective of a competitive marketplace and adversely impacts the viability of competitive carriers that rely on Qwest for last mile loop and other facilities. It also adversely impacts the consumers served by competitive carriers. Those consumers would at the very least either (1) see double or triple digit percentage increases in their telephone rates assuming their service provider determined that it was economically feasible to continue providing service in Omaha, or (2) would be forced to find a new service provider to the extent their service provider determined it was not economically feasible to remain in Omaha.

The only alternative to the month-to-month special access rates Qwest offered McLeod for DS1 and DS3 loops in the Omaha MSA was its Regional Commitment Plan ("RCP") rates, which are 22% lower than the month-to-month special access rates, but still 91% to 111% higher than the UNE rates for the nine wire centers where Qwest received forbearance.²¹ In order to qualify for those rates, however, a competitor would have to commit to a four-year term and to

²⁰ McLeod Petition for Modification at 9.

²¹ McLeod Eben Declaration at ¶13.

purchase a minimum of 90% of its total Qwest-provided DS1s and DS3s at the RCP rates.²² In other words, a carrier would have to forgo its right to purchase UNE DS1s and DS3s for all but 10% of its demand *throughout Qwest's entire 14-state service territory* in order to get a 22% discount off the monthly special access rates in the *nine Omaha wire centers* for which the Commission granted forbearance. In a blatant effort to deter carrier customers from purchasing services from competitive carriers whose presence in the market might serve to constrain Qwest's special access pricing, the RCP also contains a take-or-pay provision. For each month that an RCP customer falls below the 90% commitment level for its special access purchases, the customer must nonetheless pay Qwest the full amount that would have been billed had the 90% commitment been satisfied.²³ Thus, the RCP would make it uneconomical for a carrier to purchase all but a small fraction (10%) of its DS1 and DS3 demand throughout Qwest's 14-state service area from carriers other than Qwest even where such services are available.

Qwest imposed similarly onerous, non-negotiable conditions as the price for obtaining the "commercial agreement" rate for stand-alone DS0 loops. Although Qwest remains obligated to make stand-alone DS0 loops available to competitors pursuant to Section 271 of the Act in the nine wire centers where the Commission granted forbearance,²⁴ Qwest demanded that McLeod waive its rights under the Qwest Performance Assurance Plan and other wholesale quality service standards in order to secure a rate that is 30% over the UNE DS0 loop rate.²⁵ In granting Qwest Section 271 authorization in Nebraska, the Commission specifically found that the

²² McLeod Eben Declaration at ¶10.

²³ Qwest FCC Tariff No. 1, Section 7.1.3 at 7-104.

²⁴ *Omaha Forbearance Order* at ¶80.

²⁵ McLeod Eben Declaration at ¶24 and Exhibit 3, Appendix 4 at Section 4.6.

Performance Assurance Plan adopted by the Nebraska Commission provided assurance that the market would remain open after Qwest received Section 271 authority and constituted probative evidence that Qwest would continue to meet its obligation to provide nondiscriminatory service to competing carriers.²⁶ Qwest's attempt to nullify the mechanism put in place by the Nebraska Commission to monitor its compliance with its Section 271 nondiscrimination obligations as a condition of entering into a "commercial agreement" for stand-alone DS0 loops speaks volumes about its intent to comply with those obligations. As the only DS0 loop supplier in Omaha, Qwest is able to force customers to waive their legal rights to nondiscriminatory treatment as measured by the wholesale service quality standards to which Qwest is subject. Again, Qwest's post-forbearance behavior is not reflective of that of a carrier operating in a competitive marketplace.

In another transparent effort to deter competition from facilities-based carriers, Qwest priced stand-alone DS0 loops 30% higher than the QPP/QLSP UNE-P replacement product loop rate. Qwest cannot claim that its costs are lower for providing the finished QPP/QLSP product than for providing stand-alone loops. Its pricing strategy, however, rewards carriers that do not use any of their own facilities to serve end users and punishes facilities-based carriers that want to provide service through a combination of Qwest UNE loops and their own switching and other network facilities.

The only apparent alternative to the "commercial agreement" rate for stand-alone DS0 loops is the special access rate. The monthly recurring special access rate is 234% higher than

²⁶ *In the Matter of Application of Qwest Communications International For Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, Memorandum Opinion and Order, 17 FCC Rcd 26303 at ¶¶440, 443 (2002).

the UNE rate and the special access DS0 loop non-recurring charges are more than *11 times higher* than the UNE non-recurring charges.²⁷

As noted above, Qwest's average rate of return on its special access circuits in 2006 was 132%.²⁸ A triple digit rate of return cannot possibly be assumed to reflect competitive market conditions. Qwest's demonstrated unwillingness to negotiate the rates, terms and conditions of the loops and transport that it is required to provide to competitors in Omaha pursuant to Section 271 caused at least one carrier to leave the market²⁹ and a second carrier to abandon plans to enter the market.³⁰ This real life experience with the aftermath of premature wholesale deregulation shows that the Commission was clearly wrong in assuming that the presence of a single facilities-based cable competitor in the Omaha retail market was sufficient to constrain Qwest's rates, protect consumers and promote competition. In preparing its decision on remand, the Commission should acknowledge that it made a mistake in Omaha³¹ and that departure from that precedent was appropriate in the *Verizon 6 MSA* and *Qwest 4 MSA* Orders.

²⁷ McLeod Eben Declaration at Exhibit 1 at 1.

²⁸ See *In the Matter of Special Access Rates For Price Cap Local Exchange Carriers*, CC Docket No. 05-25, Comments of the AdHoc Telecommunications Users Committee filed August 8, 2007 at Appendix 1, page A-1.

²⁹ McLeodUSA Petition for Modification.

³⁰ Comments of Integra Telecom, Inc. and Affidavit of Dudley Slater filed in WC Docket No. 06-172 on March 5, 2007.

³¹ Anchorage presented a somewhat different situation. As a condition of granting forbearance to ACS in five wire centers in Anchorage, the Commission required ACS to continue to provide requesting carriers access to loop facilities under rates, terms and conditions reached through commercial negotiations. Until such a commercial agreement was reached, the Commission required ACS to provide its cable competitor access to loop facilities in the 5 wire centers under the rates, terms and conditions that the cable operator and ACS had previously negotiated and agreed on for Fairbanks, Alaska. *ACS UNE Forbearance Order*, at ¶22. No such condition was imposed on Qwest in Omaha.

II. Promotion Of Competition Is Critical To the Success of The National Broadband Plan

Clearly, the forbearance standard the Commission applied in Omaha was not appropriate for determining whether the market was competitive enough to warrant wholesale deregulation. To the extent the Commission needs additional incentive to depart from that precedent, it need look no farther than the Stimulus legislation enacted earlier this year. Congress and the Administration have allocated billions of dollars to expand access to and stimulate demand for broadband service.³² In addition, Congress has charged the Commission with developing a National Broadband Plan whose focus “is to enable the build out and utilization of high speed broadband infrastructure.”³³ Although broadband is available in most areas of the country,³⁴ subscribership rates remain less than optimal. Congress has directed the Commission to include in the National Broadband Plan “a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public.”³⁵

Cable operators and incumbent LECs continue to provide the vast majority of broadband connections.³⁶ One sure way to stimulate demand for and to increase the affordability of

³² American Recovery and Reinvestment Act, Pub.L.No. 111-5, Section 6001.

³³ *In the matter of A National Broadband Plan For Our Future*, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 (rel. Apr. 8, 2009) at ¶ 1.

³⁴ FCC Industry Analysis and Technology Division, Wireline Competition Bureau, *High Speed Services for Internet Access: Status As Of June 2008* (July 2009) at 4 (estimating that high speed DSL connections are available to 83% of the households to whom incumbent LECs could provide local telephone service and that high speed cable modem service is available to 96% of the households to which cable system operators could provide cable television service) (“*Broadband Report*”).

³⁵ American Recovery and Reinvestment Act, Pub.L.No. 111-5, Section 6001(k)(2)(B).

³⁶ *Broadband Report* at 3.

broadband is to promote competition in the provision of the service.³⁷ Only competition will bring rates down, increase the availability of offerings and drive maximum utilization of the network infrastructure. Prematurely relieving an ILEC of its statutory obligation to provide competitors access to the essential network elements they need to offer their customers broadband service will accomplish none of these goals, but will surely perpetuate the existing cable/ILEC duopoly.

Congress clearly contemplated that competition and competitive choice for consumers should be a central focus of the National Broadband Plan and the broadband grants and loans to be awarded by NTIA and RUS. All applicants for NTIA and RUS funds are required to adhere to the principles contained in the Commission's Internet Policy Statement,³⁸ including the principle that consumers are entitled to competition among network providers, application and service providers, and content providers.³⁹ Congress directed RUS to give priority in awarding loan funds to project applications "for broadband systems that will deliver end users a *choice* of more than one service provider."⁴⁰ In evaluating grant applications, NTIA reviewers are required to consider whether applicants for funds to construct last mile and middle mile infrastructure (i.e., loops and transport) will implement business plans that will allow more than one provider to serve end users in the funded areas and are directed to give additional

³⁷ See Comments of the Federal Trade Commission filed in GN Docket No. 09-51 at 1 ("Policies that promote competition and consumer protection can foster new and innovative offerings and greater consumer use of those services.")

³⁸ *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-151 (rel. Sep. 23, 2005).

³⁹ American Recovery and Reinvestment Act, Pub.L.No. 111-5, 123 Stat.115, 515; Notice of Funds Availability, 74 Fed. Reg. 33110 (July 9, 2009).

⁴⁰ American Recovery and Reinvestment Act, Pub.L.No. 111-5, 123 Stat. 115, 118 (emphasis added).

consideration to applicants that commit to offering wholesale access to their network facilities at reasonable rates and terms.⁴¹

Competitors use unbundled loops and transport to provide broadband service to end users and need access to those wholesale inputs to provide competitive service. The Commission must ensure that a faulty forbearance analysis does not frustrate the right of consumers to competition among network providers, application and service providers, and content providers that both the Commission and Congress have formally acknowledged and recognized.

III. Potential Competition Should Not Be A Factor In The Commission's Forbearance Analysis

The Commission has asked how the existence of potential competition should affect the Commission's forbearance analysis.⁴² The Commission's projections of "potential competition" should not factor into the forbearance analysis at all. As detailed above, the Commission's prognostication record with respect to market incentives and competitive behavior is not particularly strong. While it may be true that "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable and not unreasonably discriminatory,"⁴³ the same cannot be said for "potential competition" as the Omaha experience proved. Before taking the very significant step of declining to enforce statutory obligations imposed by Congress, the Commission should focus only on the state of actual competition in the relevant product markets.

The *Omaha Forbearance Order* is not the only example of the Commission's inappropriately relying on "potential" competition to justify deregulation. The Commission's

⁴¹ Notice of Funds Availability, 74 Fed. Reg. at 33120-33121.

⁴² Remand Public Notice at 3.

⁴³ *Omaha Forbearance Order* at ¶63.

predictive judgment of the impact of potential competition on ILEC pricing has also been called into question by the Government Accountability Office (“GAO”).⁴⁴ Beginning in 2001, the Commission began granting pricing flexibility for special access services to the price cap incumbent LECs based on the potential of collocated competitors to build their own networks to reach customers. The Commission predicted that in markets that met the collocation triggers, competition would be sufficient to discipline special access rates and drive interstate special access rates toward the marginal costs of providing those services.⁴⁵ The primary method by which the Commission sought to accomplish its deregulatory objective of driving rates toward costs was to progressively grant ILECs greater flexibility to set their own rates commensurate with the level of competition that had developed.⁴⁶ As was the case in Omaha, the Commission’s predictive judgment has failed to materialize. The GAO found in a study completed in 2006 that the ILECs’ special access prices and average revenues are higher on average in Phase II MSAs where competition is theoretically most vigorous than they are in Phase I MSAs or areas where prices are still constrained by price caps. The GAO also found that list prices for special access services have increased on average since Phase II pricing flexibility was granted.⁴⁷ Significantly, the GAO also determined that Phase II MSAs generally have a

⁴⁴ Government Accountability Office, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 (Nov. 2006) at 27-28 (“GAO Report”).

⁴⁵ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) at ¶61 (“TRRO”), *aff’d sub nom. Covad Communications Company v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd 1994 at ¶18 (2005) (“*Special Access Order*”).

⁴⁶ TRRO at ¶61.

⁴⁷ GAO Report at 13, 27-28. The GAO Report is consistent with evidence that McLeod has submitted to the Commission showing that once Qwest was granted Phase II pricing flexibility

lower percentage of buildings lit by competitors than Phase I MSAs, again indicating that the Commission's competitive triggers do not accurately predict competition for last mile access to buildings.⁴⁸ Contrary to the Commission's prediction that pricing flexibility would drive special access rates towards the costs of providing the service, ILECs have been able to implement rate *increases* for special access services after being deregulated on the assumption that competition would constrain rates.

These experiences underscore the ineffectiveness of the Commission's presumption that "potential" competition will either constrain rates for Section 271 elements once the Commission declines to enforce Section 251(c)(3) or will constrain rates for special access services once the Commission grants the ILECs Phase II pricing flexibility.

IV. Actual ILEC Market Share and Actual Facilities-Based Competition Should Be The Touchstones Of The Commission's UNE Forbearance Analysis

The Commission has asked what evidence beyond market share for a particular product market is relevant to whether forbearance from unbundling is warranted.⁴⁹ Where the ILEC retains market power, as Qwest and Verizon do in the 10 MSAs at issue, the Commission cannot determine that enforcement of Section 251(c)(3) is not necessary (1) to ensure that the ILECs' charges and practices are just, reasonable and not unjustly discriminatory, (2) to protect consumers by ensuring that they have access to reasonably priced service from the carrier of their choice and (3) to promote and enhance competition. At a minimum, the Commission

in the Omaha MSA, it *increased* its special access monthly DS1 channel termination rates 45.83% over the price cap rate for month-to-month customers, 42.61% over the price cap rate for one year term customers and 31.58% over the price cap rate for two-year term customers. McLeod USA Petition for Modification, Eben Declaration at ¶9.

⁴⁸ GAO Report at 12-13.

⁴⁹ Remand Public Notice at 3.

should not grant an ILEC forbearance from the statutory obligations to provide access to unbundled loops and transport unless the ILEC has a retail market share of less than 50% *and* faces significant competition from more than one wholesale provider able to provision transport and last mile access over its own facilities to 100% of the customer locations in the geographic market for which forbearance is requested.⁵⁰ Any assessment of competition must look at both the retail market and the wholesale market. If one or both are characterized by monopoly or duopoly, forbearance should be denied.

A. The ILEC Market Share Calculation Must Include All Lines Provisioned Over The ILEC's Network and Facilities

While the Commission correctly found in both the Verizon and Qwest decisions that competition that relies on the ILEC's own facilities is not a sufficient basis to grant forbearance from UNE requirements,⁵¹ it incongruously attributed resold ILEC lines and lines provisioned with the ILECs' UNE-P replacement products to competitors for purposes of calculating the ILECs' market share.⁵² These services are provided solely over the Verizon and Qwest networks, Verizon and Qwest set the rates for the services, and the services do not "compete" with their retail services. For these reasons, resold lines and lines provisioned with the ILECs' UNE-P replacement product cannot constrain the rates, terms or conditions the ILECs set for

⁵⁰ The Commission has applied a similar standard in determining whether an ILEC should be freed from dominant carrier regulation in the provision of access services. See *Verizon 6 MSA Order* at ¶30; *Qwest 4 MSA Order* at ¶28.

⁵¹ *Verizon 6 MSA Order* at ¶42; *Qwest MSA Order* at ¶41; but see *Qwest Omaha Forbearance Order* at ¶68 ("competition" that relied on Qwest's wholesale inputs used to justify relief from Section 251(c)(3) unbundling obligations).

⁵² *Verizon 6 MSA Order* at ¶¶27, 37, n. 89 and Appendix B; *Qwest 4 MSA Order* at ¶¶27, 36, n. 105 and Appendix B.

their retail services and are not appropriately characterized as “CLEC lines.” As a result, they should be attributed to Verizon and Qwest for purposes of calculating market share.

B. The Commission Must Examine Market Share In The Relevant Product Markets

Although it has never explained precisely why, the Commission in the past has declined “to formally define product markets pursuant to a market power analysis for purposes of our UNE forbearance analysis.”⁵³ This has led to absurd results. In Omaha, for example, the Commission granted Qwest forbearance from Section 251(c)(3) based on the presence of one facilities-based cable provider operating primarily in the retail mass market.⁵⁴ Thus, Qwest was relieved of the obligation to provide unbundled access to DS1 and DS3 transport and last mile loops -- products not purchased by or used to serve the retail mass market -- because the Commission determined that there was sufficient competition in the retail mass market. The Commission cannot perform a meaningful analysis of market share for purposes of determining the competitiveness of a market without first defining the relevant product markets.

1. Wholesale/Retail Competition

Where an ILEC requests forbearance from the Section 251 obligation to provide UNE loops and ports, as Verizon and Qwest have done here, and where the record demonstrates that competitors in the retail market rely heavily on access to UNE loops and transport to serve their customers, as is the case for the 10 MSAs at issue,⁵⁵ the Commission’s forbearance analysis must focus on the level of facilities-based competition in the wholesale market. UNE loops and transport are wholesale products, not retail products. While competition in the wholesale market

⁵³ *Qwest 4 MSA Order* at n. 129.

⁵⁴ *Omaha Forbearance Order* at ¶ 2.

⁵⁵ *Verizon 6 MSA Order* at ¶¶23, 37, 38, 42; *Qwest 4 MSA Order* at ¶¶16, 36.

is likely to positively impact competition in the downstream retail market, the opposite is not true. For this reason, it makes no sense to assume, as the Commission did in Omaha, that competition in the retail market will constrain an ILEC's rates, terms or conditions for wholesale services, protect consumers of wholesale services or promote competition among telecommunications providers. Because the only alternatives to UNE loops and transport available from the ILECs are supracompetitively-priced special access channel terminations and transport, prematurely eliminating the ILECs' obligations to provide access to UNE loops and transport in the absence of alternatives available from facilities-based wholesale providers will squelch rather than promote competitive market conditions and will diminish rather than enhance competition among telecommunications providers.

In the *TRRO*, the Commission specifically declined to adopt a rule foreclosing access to Section 251 UNEs solely because of the availability of the ILECs' special access services⁵⁶ The Commission found that the availability of UNEs serves as a check on special access pricing and that in the absence of UNEs, carriers using special access could lose substantial bargaining power when negotiating special access rates.⁵⁷ In addition, the Commission determined that where UNEs are unavailable, ILECs would have the incentive to price their tariffed special access services at levels that will foreclose facilities-based competition:

In the absence of UNEs, incumbent LECs would, in some metropolitan statistical areas (MSAs), have the ability to set the price of their direct competitors' critical wholesale inputs (e.g., tariffed end-user channel termination and dedicated transport offerings). . . . An incumbent in that situation would have substantial incentive to raise prices to levels close to or equal to the associated retail rate, creating a "price squeeze" and foreclosing competition based on use of the tariffed wholesale input.

⁵⁶ *TRRO* at ¶ 52.

⁵⁷ *TRRO* at ¶ 65.

* * *

[A] rule that foreclosed access to all UNEs wherever competitors had access to tariffed alternatives would diminish the facilities-based competition that is the most effective discipline to anticompetitive price squeezes. Such a rule would allow an unacceptable level of incumbent LEC abuse because incumbent carriers could strategically manipulate the price of their direct competitors' wholesale inputs to prevent competition in the downstream market. Moreover, we believe that the uncertainty and risk associated with even the possibility of such abuse would chill competitive entry, because competitive carriers might well be averse to initiating service when they know that the incumbent could – on one day's notice, without Commission approval, and with limited market-based discipline – render competition untenable by raising tariffed prices.⁵⁸

The Commission's *TRRO* analysis accurately predicted what has happened in Omaha since the Commission relieved Qwest of the obligation to provide UNE loops and transport. It is also an accurate precursor of what would happen in the 6 Verizon MSAs and the 4 Qwest MSAs if the Commission granted forbearance because Verizon's and Qwest's special access services are the only ubiquitously available alternatives to UNEs.⁵⁹ Verizon's and Qwest's ability to manipulate the price of their competitors' wholesale inputs in the absence of UNEs would both foreclose competition and chill competitive entry in the downstream retail market.

Where competition in the retail market depends on the availability of Section 251(c)(3) wholesale inputs from the ILEC, the Commission should not forbear from enforcing Section 251(c)(3) unless there are at least two wholesale providers in addition to the ILEC that offer transport and last mile access over their own facilities capable of serving 100% of the end users in the geographic market for which forbearance is sought. Such a standard will diminish the risk that premature deregulation in the wholesale market will significantly depress competition in the

⁵⁸ *TRRO* at ¶¶59, 63. The Commission also found that the presence of facilities-based competitors relying upon UNEs may play a critical role in constraining special access pricing. *Id.* at ¶62.

⁵⁹ *Verizon 6 MSA Order* at ¶ 38 (record does not reflect any significant alternative source of wholesale inputs for carriers in any of the 6 MSAs); *Qwest 4 MSA Order* at ¶ 37 (record does not reflect any significant alternative source of wholesale inputs for carriers in any of the 4 MSAs).

retail market. The Commission appropriately found that the records developed in the Verizon 6 MSA and the Qwest 4 MSA forbearance proceedings showed no significant alternative sources for wholesale loop or transport inputs. The Commission was justified in denying Verizon's and Qwest's request for forbearance from Section 251(c)(3) on this basis alone.

2. Loop/Transport Competition

Where an ILEC requests forbearance from the obligation to provide both unbundled loops and unbundled transport, as Verizon and Qwest have done, the Commission must separately evaluate competition in the wholesale market for loops and the wholesale market for transport. The Commission has previously determined that last mile access and local transport constitute separate relevant product markets that may be subject to varying levels of competition.⁶⁰ There is no reason to depart from that precedent in the forbearance analysis. In determining whether an ILEC is entitled to relief from the obligation to provide access to unbundled loops, the Commission must also separately evaluate competition for last mile loop facilities deployed to mass market and those deployed to business customers.

C. Duopolies Do Not Produce Competitive Prices

In granting forbearance from Section 251(c) in both Omaha and Anchorage, the Commission relied on the presence of a single facilities-based competitor -- the cable operator -- capable of serving 75% of end users using its own network. Section 10(a)(1) provides that the Commission may not forbear from applying a regulation or provision of the Communications Act unless it finds that enforcement of the regulation or statutory provision is not necessary to ensure that the carrier's charges, practices, classifications or regulations are just, reasonable and

⁶⁰ See, *In the Matter of Verizon Communications, Inc. and MCI, Inc. For Approval Of Transfer Of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, FCC 05-184 (rel. Nov. 17, 2005); see also, *TRRO* at ¶¶66 and 146 (establishing different rules to evaluate impairment on transport routes than to evaluate impairment for last mile access).

not unjustly or unreasonably discriminatory. There is an extensive body of literature that demonstrates that duopoly market conditions produce high prices, frustrate innovation and can lead to tacit collusion by providers. Two facilities-based retail alternatives to the ILEC are the minimum necessary to discipline the ILEC's retail rates, terms and conditions of service and two facilities-based wholesale alternatives to the ILEC are the minimum necessary to discipline the ILEC's wholesale rates, terms and conditions of service.

The wireless markets have been studied to determine the effect of duopoly structure on pricing and possible collusion.⁶¹ Parker and Roller evaluated wireless pricing during 1984 and 1988 when the Commission licensed only two competing cellular services in each geographic area,⁶² thereby creating a duopoly.⁶³ Their analysis concluded that the carriers' behavior was consistent with tacit collusion to sustain higher prices.⁶⁴ Consumer harm from duopoly conditions in wireless markets is not limited to the United States. Stoetzer and Tewes concluded that tacit collusion characterized the German market during similar conditions,⁶⁵ while Valletti

⁶¹ A useful survey addressing pricing in the wireless markets can be found in: Gans, J.S., King, S.P. and Wright, J., *Wireless Communications, Handbook of Telecommunications Economics V2*, M. Cave, S. Majumdar and I. Vogelsang, eds., North-Holland, 2005 at 260-264.

⁶² See, *In the Matter of the Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect To Commercial Mobile Services*, 10 FCC Rcd 8844 (1995) at ¶3.

⁶³ See *Collusive Conduct in Duopolies: Multimarket Contact and Cross-ownership in the Mobile Telephone Industry*, P. Parker, and L.H. Roller, *RAND Journal of Economics*, 28(2) 1997 at 304-322.

⁶⁴ See also *Multimarket Contact and Price Coordination in the Cellular Telephone Industry*, M. Busse, *Journal of Economics and Management Strategy*, 9(3) 2000, at 287-320.

⁶⁵ *Competition in the German Cellular Market*, M. Stietzer and D. Tewes, *Telecommunications Policy*, 1996, 20, 303-310.

and Cave argue that tacit collusion explained seven years of stable prices in the United Kingdom followed by a sudden decrease in prices following the entry of two new competitors in 1993.⁶⁶

Several years ago, the GAO did a study of the video distribution market, which at the time was highly concentrated, with consumer choice limited to an incumbent cable provider and a broadcast satellite provider. The GAO estimated that the addition of a single *additional* competitor (*i.e.*, a broadband service provider) produced lower rates and better service.⁶⁷ Based on the GAO's analysis, moving away from a duopoly-like structure (cable plus satellite) produced rates 15% to 41% lower in five of the six markets studied.⁶⁸

Finally, there is a growing body of evidence that duopoly conditions in residential telephone markets are producing higher rates for consumers when the incumbent's prices are deregulated. In 2006, the California Public Utility Commission began eliminating price caps on local services provided by ILECs, relying on competition from cable (as well as wireless and VoIP) to constrain the ILECs' pricing behavior. A recent analysis concluded that most California consumers have a choice of only two wireline providers – the ILEC and the cable provider.⁶⁹ Since 2006, AT&T and Verizon have increased basic local service rates by between 13% and 26%, increases that are estimated to cost California consumers more than \$100 million

⁶⁶ *Competition in UK Mobile Communications*, T. Valletti and M. Cave, Telecommunications Policy, 1998, 22, 109-131.

⁶⁷ U.S. General Accounting Office, *Wire-based Competition Benefited Consumers in Selected Markets*, Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate, GAO 04-241 (February 2004). Consistent with overall trends towards integrated services, the competitive providers studied offered video, Internet access and telecommunications (as do the incumbent cable providers).

⁶⁸ *Id.*, at 1.

⁶⁹ *Why "Competition" is Failing to Protect Consumers*, T. Roycroft, TURN, March 25, 2009, at iii.

annually.⁷⁰ During that same period, Verizon has increased Lifeline rates by 12%, directory assistance rates by 188%, the price of a three minute toll call by 171%, and returned check charges by 233%.⁷¹ Such rate increases are not reflective of a competitive market place. Rather than driving rates toward marginal cost, deregulation has had the opposite effect.

The California experience – *i.e.*, deregulation producing higher retail rates – has been repeated in other states. In 2006, the Illinois Commerce Commission deregulated most residential rates in the Chicago MSA, where AT&T and Comcast dominate the market, while the rest of the state remained under price cap regulation. Following deregulation, AT&T implemented significant rate increases for residential local telephone services in the Chicago MSA. Indeed, the rates were raised to levels higher than the rates in the areas of the state where the services are deemed to be “non-competitive.” Thus, rather than reducing rates to respond to competitive pressures in the market, AT&T has been able to take advantage of the absence of price constraining regulation to increase rates in the allegedly “competitive” Chicago market, generating net revenue increases of \$149 million per year.⁷² As the Illinois Attorney General concluded, “[t]he absence of serious price competition between AT&T Illinois and Comcast at the retail level and their combined . . . retail market share is by itself a compelling demonstration of the existence of a duopoly exhibiting implicit, if not explicit coordinated conduct.”⁷³

⁷⁰ *Id.*, at i.

⁷¹ *Id.*

⁷² *See Report on the Competitiveness of the Residential Telecommunications Market and Price Changes in Illinois MSA 1 Since Entry of 2006 Final Order Submitted By The People Of The State Of Illinois*, filed in Illinois Commerce Commission Docket 06-0027 by the Illinois Attorney General’s Office on December 2, 2008.

⁷³ *Id.* at 16.

In 2005, the Texas Legislature deregulated all of AT&T's local retail rates in markets that had a population exceeding 30,000 and at least two competitors (including wireless). The only residential service that remained subject to price caps was a "stand-alone" local exchange voice service. Once deregulated, AT&T introduced a "new" version of its residential local exchange service, which it called "Standard Plus," that automatically applied to any residential line that included *any* additional feature or service.⁷⁴ Since May 2006, AT&T has used Standard Plus to increase local rates (at least for any customer that subscribes to more than simply stand-alone basic local service) by between 58% (in its largest exchanges) and 90% (in its smallest markets).⁷⁵

What these examples suggest is that retail markets with only two facilities-based providers are not competitive and that consumers in such markets are likely to experience an increase, rather than a decrease, in their rates once deregulation is implemented. Premature forbearance from Section 251 virtually guarantees that there will be only two facilities-based competitors left standing – the ILEC and the cable operator. There is no reason to believe that Verizon and Qwest would not raise the rates for loops and ports significantly in the 10 MSAs, as

⁷⁴ Notably, customers did not affirmatively select Standard Plus service, as much as they were converted to the "new" local service by virtue of their decision under the prior rate schedule to add a feature or service to their account. Among the decisions that would convert a consumer to "Standard Plus" service was the decision to add an additional directory listing.

⁷⁵ See Direct Testimony of Joseph Gillan, *Petition For Review Of Monthly Per Line Support Amounts From The Texas High Cost Universal Service Plan Pursuant To PURA § 56.031 And P.U.C Subst. R. 26.403*, Texas Public Utilities Commission, PUC Docket No. 34723/SOAH Docket No. 473-08-0288, January 11, 2008, at 42-48. In Illinois, AT&T adopted similar rate increases for *uSelect 3* (local services with 3 custom calling features) after deregulation. In addition to imposing rate increases on existing *uSelect 3* customers, it grandfathered the offering to existing customers only, replacing it for new customers with the *Select Feature Package* priced 12% higher. *Report on the Competitiveness of the Residential Telecommunications Market and Price Changes in Illinois MSA 1 Since Entry of 2006 Final Order Submitted By The People Of The State Of Illinois* at 8.

Qwest did in Omaha, once the wholesale market is deregulated, thereby chilling entry and driving competitors from the market. Clearly, granting forbearance from UNE obligations based on retail competition from a single cable competitor is not consistent with the mandate of Section 10. The Commission should not again characterize a duopoly retail market as sufficiently competitive to warrant forbearance from enforcement of an ILEC's Section 251(c)(3) wholesale unbundling obligations.

V. UNE Forbearance Is Not Warranted For Either Qwest Or Verizon

The Commission correctly denied both Verizon's and Qwest's forbearance petitions. The records showed that the intramodal competitors in each of the 10 markets rely significantly on access to the Verizon's and Qwest's wholesale last mile network facilities, including UNEs.⁷⁶ The records also showed that there are no significant alternative sources of wholesale inputs for carriers in any of the 10 markets.⁷⁷ On the retail side, the evidence showed that a cable operator was the only competitor that had deployed significant last mile network facilities in any of the markets, and that the cable operator's network served primarily residentia, not business, customers.⁷⁸ In all of the markets, Verizon and Qwest remained dominant in terms of market share. For all of these reasons, the Commission properly determined that competition was not sufficient in any of the 10 markets to relieve Verizon or Qwest of the statutory wholesale obligations Congress imposed in Section 251(c)(3).

In order to fulfill the Administration's goals of promoting the availability of a choice of providers and services in the broadband market and increasing the affordability of broadband

⁷⁶ *Verizon 6 MSA Forbearance Order* at ¶23; *Qwest 4 MSA Forbearance Order* at ¶16.

⁷⁷ *Verizon 6 MSA Forbearance Order* at ¶38; *Qwest 4 MSA Forbearance Order* at ¶37.

⁷⁸ *Verizon 6 MSA Forbearance Order* at ¶¶30, 37; *Qwest 4 MSA Forbearance Order* at ¶¶28, 36.

service, the Commission cannot eliminate an ILEC's obligation to provide wholesale access to unbundled loops and transport in markets where competitors rely on such elements to serve their customers and there are no ubiquitously available wholesale alternatives. As the Supreme Court has acknowledged, competition will produce not only lower prices, but also better goods and services. The free opportunity to select among alternative offers will favorably affect quality, service and cost. *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990). Regulation that has the effect of eliminating or diminishing competition will produce higher prices and stifle innovation.

Conclusion

For the foregoing reasons, the Commission should acknowledge that it made a mistake in granting Qwest forbearance from the obligation to provide unbundled loops and transport at cost based rates in Omaha based on the presence of a single facilities-based provider in the retail mass market. On remand, the Commission must articulate a forbearance standard, such as that proposed by COMPTTEL, that will not drive competitors from the market.

Respectfully submitted,

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